FILED
FEB 6 1917
JAMES D. MAHER
CLERK

No. 922

Supreme Court of the United States

OCTOBER TERM, 1916.

NORTH GERMAN LLOYD, CLAIMANT OF STEAMSHIP KRONPRINZESSIN CECILIE,

Petitioner,

AGAINST

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

SAME CLAIMANT,

Petitioner,

AGAINST

NATIONAL CITY BANK OF NEW YORK,

Respondent.

Petition for Writ of Certiorari, and Brief in Support of Petition.

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Counsel for Petitioner.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

HIGGINS & HIGGINS INC. PRINTERS, NEW YORK

Supreme Court of the United States

OCTOBER TERM, 1916.

NORTH GERMAN LLOYD, Claimant of STEAMSHIP KRONPRINZESSIN CECILIE,

Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

SAME CLAIMANT,

Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,

Respondent.

Sirs:

Please take notice that the annexed petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, and the annexed brief in support thereof, will be submitted to the Supreme Court of the United States at the opening of court on the 5th day of March,

1917, or as soon thereafter as counsel can be heard.

Dated, February 5th, 1917.

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Counsel for Petitioner.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

To:

MESSRS. KIRLIN, WOOLSEY & HICKOX,
Proctors for Guaranty Trust Co. of N. Y.

MESSRS. SHEARMAN & STERLING,
Proctors for National City Bank of N. Y.

Supreme Court of the United States

OCTOBER TERM, 1916.

NORTH GERMAN LLOYD, Claimant of STEAMSHIP KRONPRINZESSIN CECILIE,

Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

SAME CLAIMANT,

Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,

Respondent.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, North German Lloyd, claimant of the Steamship *Kronprinzessin Cecilie*, respectfully represents:

The respondent, Guaranty Trust Company of New York, filed its libel against the Steamship *Kronprinzessin Cecilie*, belonging to the petitioner, North German Lloyd, seeking to recover $1,793,278.22 damages for an alleged breach of contract on the part of said steamship in failing to carry a consignment of gold from New York to Plymouth, England. The respondent, National City Bank of New York, also filed its libel against said steamship seeking to recover $404,150.06 for an alleged breach of contract on the part of said steamship in failing to carry a consignment of gold to Plymouth, and $32,007.43 for an alleged breach of contract in failing to carry another consignment of gold from said port of New York to Cherbourg, France. By amendment to its libel the claim of the Bank was subsequently increased to $446,828.47.

The petitioner, as claimant, filed an answer to each of these libels (pp. 7, 116, 143) and the cases were tried together (with two other cases brought by passengers, which are not now in question) before the District Court for the District of Massachusetts, which entered decrees dismissing the libels.

Both libellants appealed to the United States Circuit Court of Appeals for the First Circuit which, by a divided court, reversed the decisions of the District Court and remanded the cases, with directions to enter an interlocutory decree for the libellants. The opinions of Judge Hale dismissing the libels are printed in the record (pp. 368-401; 402) and also appears in 228 Fed. Rep., 946. The opinion of Judge Dodge, the concurring opinion of Judge Bingham and the dissenting opinion of Judge Putnam are also printed in the record (pp. 435, 447, 459).

Facts.

Substantially all the facts are covered by stipulations which appear in the record (pp. 163-220; 310-315; 346-357).

The material facts are stated in the opinion of Judge Hale and such statement is accepted in the opinion of Judge Dodge and in the dissenting opinion of Judge Putnam. They are also examined and discussed in the brief accompanying this petition. Consequently, it is desirable here to do no more than to make the briefest possible summary in order to bring out the questions involved and the reasons why it is thought a writ of certiorari should issue.

On June 23, 1914, Archduke Francis Ferdinand of Austria and his wife, the Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia, and on July 23rd, Austria sent an ultimatum to Servia, subsequent to which date various political events took place in Europe, most of which are referred to in the diplomatic correspondence between the governments which later became involved in the war (Stipulation, p. 173 et seq.). These events were discussed at length in the American newspapers and were the subject of great public interest in this country.

On July 27, 1914, the Guaranty Trust Company shipped on the *Cecilie* 93 kegs of gold bars of the agreed value of $4,942,936.64, to be carried from New York to Plymouth, England, and thence to be forwarded at the steamer's expense but at owner's risk to London, unto Guaranty Trust Company of New York or its assigns (Stipulation, p. 164).

The National City Bank also shipped on said steamship 21 kegs of gold of the agreed value of

$1,061,718.89 to be carried to Plymouth, England, thence to be forwarded at steamer's expense but at owner's risk to London and delivered to London City & Midland Bank, Ltd., or its assigns, and at the same time the Bank shipped 40 kegs of gold of the agreed value of $2,104,254.34 to be carried to Cherbourg, France, and thence to be forwarded at steamer's expense but at owner's risk to Paris, and there delivered to Credit Lyonnais or its assigns (Stipulation, pp. 311-312).

The bills of lading issued for these shipments contained a number of stipulations, among them being an exception against loss or damage occasioned by "arrest and restraint of princes, rulers or people".

At the time of shipment the European situation was serious, but the prevailing opinion was that the diplomats of the respective powers would succeed in arriving at a satisfactory understanding.

The *Cecilie* sailed early in the morning of July 28, 1914, and continued on her voyage until the night of July 31, 1914, when at about 10 o'clock her master received a wireless message from the managing directors of the North German Lloyd at Bremen, reading: "War has broken out with England, France and Russia. Return to New York". She was then about 1070 nautical miles from Plymouth and would have arrived at that port, in ordinary course, early in the morning of August 3rd (Stipulation, pp. 164-165-166, fols. 656-662). Shortly after the receipt of this message the *Cecilie* turned back on her course and proceeded in a westerly direction (Record, fol. 658). On the next day, August 1st, the master of the *Cecilie* received another wireless message, which had been sent out by the German Government in the Government Code, reading: "Threat-

ening danger of war, do not touch at any port England, France, Russia, Reichsmarineamt." (literally, "Imperial Marine Office" (Record, fol. 1031), The *Cecilie* continued her westerly voyage, but instead of putting into New York, on account of supposed danger from British cruisers, changed her course to Bar Harbor, Maine, where she arrived August 4, 1914. A few days thereafter both libellants accepted redelivery of their gold.

War had not actually been declared between Germany and England, France and Russia when the directors of the North German Lloyd dispatched the wireless message to the master of the *Cecilie*. A decree of threatening danger of war (Kriegsgefahr) had, however, been proclaimed at that time and a general warning had been issued to the German Merchant Marine Service through the admiralty staff, and the directors had received authoritative information that a proclamation of the existence of a state of war (Kriegzustandes) had been perfected and would immediately be published* (Stipulations, p. 165, fol. 660; p. 350, fol. 1400). In addition to this they had received authentic information that the Imperial Government was about to dispatch on that day ultimata to France and Russia (p. 165, fol. 660; p. 192, fol. 765; p. 193, fol. 769). The directors knew that the breaking out of war with all the countries named was imminent. Their reasons for sending out the message and for using the phraseology employed are stated in the stipulations (pp. 348-352; 355-6, fols. 1418-23).

*The form of this decree was as follows: "We, William, by the Grace of God, German Emperor, King of Prussia, etc., decree by virtue of Art. 68 of the Constitution of the German Empire, in the name of the Empire, the following the Imperial territory, with the exception of the Royal Bavarian territory, is hereby declared to be in a state of war. This decree goes into effect with its publication."

Furthermore the record shows that on July 30th and 31st, 1914, 23 ships of the North German Lloyd, and the ships of the Hamburg-American Line, Hansa Line and Standard Oil Company of New Jersey (which were under the German flag), upon receipt of advices from their respective owners, either returned to their ports of departure or sought or remained in neutral ports; that no German steamers left Hamburg or Bremerhaven for any foreign port after August 1, 1914, and that the last English bound steamers of the Argo Company which left Bremerhaven on July 30th, for London and Hull, upon instructions from their company returned to Bremerhaven August 1st without having discharged (Stipulations, p. 352, fol. 1408; p. 354; p. 357, fol. 1426).

The following are some of the more important events, known to the directors, which occurred subsequent to the time of sailing and prior to the time when the *Cecilie* turned back: Austria declared war on Servia (July 28); France informed Germany that she would act in harmony with her allies (July 29); Germany informed Russia of her intention to mobilize (July 29); Germany broke communications with France and concentrated troops on the French border (July 31); German Emperor issued a proclamation declaring a state of war (July 31); Austria decreed general mobilization (July 31); German Ambassador made demands upon French Government for a declaration, within eighteen hours, as to whether France would remain neutral in case of Russo-German war (July 31); German Ambassador at St. Petersburg announced to the Russian Foreign Secretary that, if within twelve hours Russia had not begun to demobilize, not only against Germany, but also against Austria, the German Gov-

ernment would be compelled to give the order for mobilization.

Information as to some of the above events and others not enumerated above was received by the master of the *Cecilie* by wireless.

The following are among the important events which occurred after the *Cecilie* turned back: Order for general mobilization of German army (August 1); British ships detained by German authorities (August 1); General mobilization of French army (August 1); Germany declared war on Russia (August 1) (Germany's declaration of war on Russia was, on account of treaty relations equivalent to a declaration of war against France also*); Luxemburg and French territory invaded (August 2); State of war declared to exist between France and Germany (August 3); England declared war on Germany (August 4).

Outline of Leading Questions in Case.

The District Judge ruled that upon the information which the captain of the *Cecilie* had received and the facts within his knowledge he had a reasonable apprehension of impending danger and was justified in turning his ship back and in so doing acted with due regard to the safety of the ship, passengers and cargo. Judge HALE placed his decision not upon the exceptions in the bill of lading but upon general principles of maritime law approved in the case of the *Styria*, 186 U. S., 1.

*On July 26, 1914, the German Ambassador at St. Petersburg was directed to make the following declaration to the Russian Government: "Preparatory military measures by Russia will force us to counter measures which must consist in mobilizing the army. But mobilization means war. As we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France * * * " (Stipulation, p. 177.)

Judge DODGE of the Circuit Court of Appeals held that the case did not come within the exceptions in the bill of lading and disposed of the position taken by Judge HALE by holding that the master of the *Cecilie* exercised no judgment or discretion because he received an order from the owner of the ship. *But the learned judge fails to notice in his opinion that the master in the Styria case as well as the master in Nobel's Explosives Co. v. Jenkins, L. R., 1896, 2 Q. B., 326 (referred to at length by this Court in the Styria case) received just as peremptory orders as the master of the Cecilie received in this case.*

Judge BINGHAM of the Circuit Court of Appeals also insists in his opinion that the master exercised no discretion because he received an order from the owners. But this judge ignores entirely the *Styria* decision in this connection.

The language of the *Styria* decision, which the Circuit judges disregarded, is printed in the accompanying brief. In substance this Court said that the master of the ship represented all interests, and exercised his judgment in not sailing with the cargo, notwithstanding instructions from the ship's agents, adding that "all that can be said is that there was a concurrence of judgment between the ship's agents and the master as to what was the proper course to pursue".

In this case the record shows conclusively and there is no question that the master was proceeding cautiously, making inquiries as to conditions, and that from the information he received he knew that the war situation was growing graver and that actual war was imminent. He was also keeping close track of his coal supply which was growing short if there were necessity for turning back. He was looking for messages and had conferences

with his officers as to the course to pursue. When he received the wireless message from his owners it was his judgment, in view of the whole situation, that the only proper thing to do was to turn back and he did so. The wisdom of his course is confirmed by the message from the Imperial Marine Office which he received on the following day. This message is not referred to by either Judge DODGE or Judge BINGHAM. What occurred was just like that which took place in the *Styria* case. The judgment of the master concurred with that of the owner.

And it is manifest that upon the facts presented to the master there was no other course to take. If war had broken out with France, Russia and England to go on meant certain capture. If the master had obtained the facts stated in the directors' message from any other credible source there can be no question but that his action in turning back would have been justified. It follows then that if the action of the master be not justified it is because of the owner's message. In other words, the claim is made and is supported particularly by the opinion of Judge BINGHAM that if the statements in the owner's message were not true the claimant cannot set up the exercise of the master's judgment as a defense. Judge BINGHAM thinks that to permit such a defense would be equivalent to permitting a person to take advantage of his own fraud.

The message was in no respect fraudulent. It was a private message from owner to master. Third persons could not have been and were not misled. The owners were acting in days of stress and anxiety. If they had stated merely that a state of war had been proclaimed, this would have been incomprehensible to the captain who was not

familiar with the regulations of political law. Only the information that war had broken out could show him the political situation in the same degree of distinctness and clearness with which the directors viewed it at Bremen, and only such information would indicate to him in the guidance of his vessel the deportment and care which the situation required. The directors were bound to assume that owing to congestion of the wireless facilities a long period would elapse before the receipt of their message, during which time there would be a further aggravation of the situation and they knew that when a formal declaration of war was made all further communication with their ship would be cut off on account of the isolation or interruption of the telegraphic connections (Stipulation, pp. 355-356, fols 1420-1422.)

The test as to whether the owners are to be barred by the form of their message from setting up the master's judgment in concurrence with their own as a defense must be this: If the directors could have included in their message a statement of all the political events which had occurred down to the time of its dispatch, would a prudent master have been justified in turning back? The owners cannot be estopped by what they said if the whole and exact truth would have produced the same result. And we submit that had these owners been able to incorporate in their wireless message all the facts known to them showing the critical state of affairs and the actual existence of a "state of war" the only possible course for Capt. Polack to have taken would have been to turn back exactly as he did. Otherwise he would have run into the teeth of danger and

exhausted his coal supply. He could not have gone on awaiting developments and then turned back.

Looking at the case from another point of view the same result is reached. We insist upon the authority of *The Styria* that the master represented all interests and that instructions from the owners regarding the ship did not change his obligations. But if this position be wrong and the act of the owner be, on account of modern conditions of communication, substituted for that of the master, then the responsibility of the owner must carry with it the corresponding right and the question then is, not whether the facts stated in the owner's message were literally true, but whether the instructions were justified. And here we claim that the facts disclosed in the record and discussed in our brief fully justify such instructions and that reasonable prudence, bearing in mind all interests, required the ship to turn back before it was too late. Indeed it is our contention upon such facts that the directors of the North German Lloyd were not only justified in sending out their message but that it was their duty to send it. And the performance of such a duty cannot create a liability.

Another most important point is also overlooked entirely in the opinions of the Circuit Judges. If the *Cecilie* had not turned back on the night of July 31st, she would necessarily have turned back the next day, August 1st, when the German Imperial Marine Office (Reichsmarineamt) sent the message already referred to, directing ships not to touch at any English, French or Russian port. Surely, the master, as a prudent man, could not have ignored this message and if he had followed it the same situation would have

existed except that on account of the small coal supply the ship might have had more difficulty in reaching the United States.

This subject is fully discussed in our brief, which raises the additional question as to whether the government order did not, in itself, create a "restraint" within the meaning of the bills of lading.

The majority opinions further hold that the case did not come within the exception "arrest and restraint of princes" in the bill of lading. In this we think there was error and that the defense based upon such exception ought to have been sustained. A reasonable apprehension that war will break out and result in capture before a ship can reach her destination is as much a restraint as such an apprehension after the actual outbreak of hostilities. Indeed, in these days of submarines and wireless telegraphy as well as steam, there might be more danger in approaching the port of a country with which war is imminent than, in earlier days, in going directly into enemy waters after the outbreak of hostilities.

We respectfully submit that the rule stated by Judge Dodge is too refined and technical; that this master was not required by the bill of lading to risk the capture of his ship, passengers crew and a valuable part of his cargo, by proceeding deliberately into danger.

The learned judge also confused certain principles involved in the law of marine insurance with those properly applicable to bills of lading and failed to recognize the real and substantial distinction between a restraint which justifies a claim for a constructive total loss and one which will justify a master in safeguarding the interests he represents.

In holding that there must be an existing and operating restraint to justify the master in turning back and that as war had not actually been declared such a justification cannot be found in the present case, the learned judge ignores the duty which rests upon a master to use all reasonable precautions to avoid a loss, even from a danger which is expressly excepted in the bill of lading.

Special Reasons for Allowance of Writ.

1. The decision of the Circuit Court of Appeals is not only in direct conflict with the decision of this Court in said case of *The Styria* (186 U. S., 1) but ~~are~~, we respectfully submit, contrary to principles established in other leading cases and to fundamental rules of maritime law.

2. The questions arising in the present cases are of both national and international importance in the following particulars:

(a) A great number of vessels are in a situation similar to that of the *Cecilie*.

(b) The amount involved directly and incidentally is very large.

(c) The decisions affect all vessels of the German Mercantile Marine over which or over whose owners the United States courts have or may obtain jurisdiction.

(d) Changes in the means of communication between owners on shore and their masters at sea, due to the invention of wireless telegraphy and the like, render it desirable that their rights and obligations as between themselves and as between them and the public should be fixed by the highest court.

(e) The effect of the order of the German Imperial Marine Office sent out to all German ships is a matter of sufficient importance to require a determination by this court.

(f) The rules governing the rights and duties of foreign ships when their nations are in, or verging upon, a state of war are of national and international importance.

(g) The majority of the Circuit Court of Appeals have confused principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading.

(h) Equal division of federal judges renders it important that these cases should finally be disposed of by this Court. This is particularly true, we submit, under the conditions which have arisen just as we are preparing this petition. Diplomatic relations with Germany have been broken. What the situation will be when this petition is presented to the Court no one can tell. But in any event we feel that this Court will agree with us that such very important cases affecting the rights of German subjects and creating such a precedent should be considered by this Court rather than be left to stand upon the decree of a divided lower court; so that no one will have ground for feeling that he has been denied due judicial consideration.

It is respectfully submitted that this application should be granted at the present time for the following reasons:

(a) If the application were postponed until after the entry of a final decree, much time would be consumed and expense incurred in taking proof of damages before a commissioner. Many other claims of great magnitude are dependent upon

the determination of the principles of liability involved in these cases, and if, this court should hold that the *Cecilie* is not liable, the principle of liability will be determined for all other German ships in a like situation.

(b) The damages claimed by the libellants in these cases are so large in amount and speculative in character that it is impossible for the claimant to file a bond and thus release its ship. Indeed under existing conditions it would be absolutely impossible to give a bond, and if the libellants should undertake—as they might—to have the *Cecilie* sold, vast and irreparable damage might be done to the claimant before it would have opportunity to apply again for a writ of certiorari.

(c) The case is peculiarly one where a prompt decision is essential to the protection of the rights of the claimant.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit commanding the said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the case therein entitled Guaranty Trust Company of New York, libellant-appellant, v. Steamship *Kronprinzessin Cecilie*, North German Lloyd, claimant-appellee, No. 1196, and in the case therein entitled National City Bank of New York v. Same, No. 1199, October Term, 1916, and to the end that the said causes may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

State of New York, }
County of New York, } ss.:

Charles von Helmolt, being duly sworn, deposes and says that he is a member of the firm of Oelrichs & Co., General Agents in the United States of the North German Lloyd, the petitioner above named, and that the matters stated in the foregoing petition are true to the best of his knowledge, information and belief.

CHARLES VON HELMOLT.

Sworn to before me this
5th day of February, 1917.
Frederick Nordenholt,
Notary Public,
New York County.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in our opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

Joseph Larocque,
Walter C. Noyes,
Joseph D. Bedle.

BRIEF IN SUPPORT OF PETITION.

Substantially all the facts have been stipulated by the parties and there is no question of fact involved in the case (Stipulations, pp. 163-220; 310-315; 346-357).

The material facts are stated in the opinion of Judge Hale, and such statement is accepted in the opinion of Judge Dodge and the dissenting opinion of Judge Putnam (pp. 435, 459).

There are novel, interesting and important questions of law raised in the cases, upon which questions there is an even division between the four judges who have passed upon them.

STATEMENT OF THE CASES.

The North German Lloyd steamship "*Kronprinzessin Cecilie*" was built in the year 1907 at a cost of about $4,500,000. On July 27, 1914, she was lying in the port of New York and on that day received on board consignments of gold and silver bullion of the total value of more than $11,000,000 to be carried to Plymouth, England, and Cherbourg, France.

The Guaranty Trust Company of New York shipped 93 kegs of gold bullion of the value of $4,942,936.64 to be carried to Plymouth, and thence to be forwarded to London and there delivered in like good order and condition unto the order of the libelant in consideration of $9,268 prepaid freight (Stipulation, p. 164, fols. 653).

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the Trust Company the sum of $1,544.67, the pro-

portion of the prepaid freight covering the inland transportation of said Trust Company's gold from Plymouth to London (Stipulation, p. 167, fols. 666-7).

The National City Bank of New York shipped 21 kegs of gold bullion of the value of $1,061,718.89 to be carried to Plymouth and thence to be forwarded to London and there delivered unto the London City & Midland Bank, Ltd., in consideration of $1,990.72 prepaid freight, and 40 kegs of gold bullion of the value of $2,104,254.34 to be carried to Cherbourg, France, and thence to be forwarded to Paris and there delivered unto the Credit Lyonnais in consideration of $2,630.32 prepaid freight (Stipulation, p. 311).

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the National City Bank of New York the sum of $331.79, the proportion of the prepaid freight covering the inland transportation of said Bank's gold from Plymouth to London, and the sum of $657.58, the proportion of the prepaid freight covering the inland transportation from Cherbourg to Paris (Stipulation, p. 314, fol. 1255).

Neither the Trust Company nor the Bank made any statement of the purpose for which its shipment was made, otherwise than as stated in the bill of lading, or of the disposition which it intended to make of its gold, and no notice of any special damages which might result from the failure of the steamship or of the claimant to perform its contract (Stipulation, p. 164, fol. 655; p. 312, fol. 1247).

The bills of lading were in the usual form containing, among other stipulations, an exception against liability occasioned by "arrest and restraint of princes, rulers or people" (Bills of

Lading, pp. 17, 129, 133), and there were other provisions or exceptions contained in them in favor of the shipowner, indicating that time was not regarded as of the essence of the contract.

The freight received by the claimant for these shipments was about one-eighth of one per cent of their value.

The ship carried a full complement of officers and crew amounting in all to 650 men. Altogether there were about 1892 persons on board comprising 354 Americans, 667 Germans, 406 Austrians, 3 Italians, 151 Russians, 7 French, 14 English, 1 Australian, 2 Belgians, 4 Spaniards, 2 Swiss, 3 Cubans, 8 Bulgars, 7 Serbs, 1 Roumanian, 1 Greek and 3 Hollanders, besides a large number of passengers of whose nationality there was no record at the time of the trial (pp. 302, 303).

These persons represented substantially all the nations which subsequently became involved in the war.

The steamer sailed early in the morning of July 28th and continued on her eastbound voyage until at about 10 P. M. on the night of July 31, 1914, when 1070 nautical miles from Plymouth, her first port of call, she received a wireless message from her directors at Bremen stating that war had broken out with England, France and Russia and advising that she put back to New York (Stipulation, pp. 164-165, fols. 656-660).

Captain Polack thereupon turned his ship and put back towards the United States. The following day he received a wireless message from the German Imperial Marine Office forbidding him to touch at any port of England, France or Russia (p. 259, fol. 1033).

When nearing New York, on account of supposed danger from British cruisers, Captain

Polack directed his course to Bar Harbor, Maine, where the ship arrived safely on August 4th, and all the gold and silver bullion was returned to the parties entitled thereto.

The directors of the North German Lloyd, before they dispatched their wireless message, knew of all the important political events which had transpired since the assassination of Archduke Ferdinand and his wife, and had received authoritative information from high governmental sources of the events immediately preceding active hostilities. Thus they had been informed of the proclamation of threatening danger of war for the German Empire and had received from the Imperial Admiralty Staff the general warning sent out to all ships of the German Mercantile Marine; they had been notified by Baron von Plettenberg, one of their number who had been sent to Berlin, that he had been informed by governmental officials that short time ultimata were to be sent at once to Russia and France and that an Imperial proclamation declaring the existence of a state of war had been perfected and would immediately be made public.

The Lloyd's nautical department had been constantly engaged in figuring the positions of their ships and their coal supplies and knew that a determination with respect to the *Cecilie* would have to be reached early in the afternoon of July 31st, for otherwise she would not have sufficient coal to return to the United States (fol. 1395). The correctness of their estimate is shown by the fact that when she finally reached Bar Harbor there remained in her bunkers only 450 tons, which was much less than a day's supply (fol. 997).

Before leaving New York Captain Polack, master of the *Cecilie*, had carefully read the Ameri-

can newspapers and had kept himself informed as to the progress of events (fol. 998). While on the voyage he received by wireless much additional information indicating that the political situation was becoming more acute, and, when in conference with his chief officer, expressed grave anxiety as to the situation and a desire to obtain information from the Home Office (fols. 914-939, 1039). When, on the night of July 31st, he received the message from his directors, the instructions given to return to New York coincided exactly with his own judgment and this course seemed to him to be the best and only thing to do in the circumstances (fols. 1039-1040).

That the return was fully justified is conclusively proved by the fact that on August 1st Captain Polack received from the Imperial Marine Office at Berlin a wireless message forbidding him to touch at any English, French or Russian ports (fols. 1026, 1031-3).

Judge Hale, before whom the case was tried in the District Court, made a careful examination of the evidence and decided that he (the master) "acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity". So far as the claimant's directors were concerned the learned judge held that they "acted with a reasonable apprehension of imminent peril, when they sent the wireless message to their captain," and that "the master acted with due regard to the safety of all interests intrusted to him, and under a reasonable apprehension of imminent peril".

The learned judge arrived at this conclusion "without considering the terms of the bill of lading, for the reason that the master was justified

in his action by the duty imposed upon him under the maritime law" (fol. 1604). He accordingly dismissed the libels.

In referring to Captain Polack, Judge Hale said that he impressed him "as being a truthful man, and a faithful, trustworthy shipmaster. He showed a clear appreciation of the trust imposed in him".

Judge Dodge said that the master's testimony at the trial impressed him "as it did the District Court, with its apparent truthfulness".

Judge Putnam entertained the same views of the merits of the case as Judge Hale, in fact he regards the case as too clear to require argument or the citation of authorities, for he says (p. 465), "It is unnecessary to cite authorities on this topic, because the law is too well settled and the underlying principles are all too uniformly accepted, in the circumstances of this case, to the effect that it was not only the right but the duty for the master of this ship not to delay, and hazard running his vessel into a possible hostile port, but to use justifiable precautions and reasonable grounds for apprehension of capture, and to have due regard to the uncertainties of the ocean, and leave reasonable margin for the state of weather and for accidental detentions; and under the circumstances of this case the decision to turn back was justifiable whether it came from the master or owners."

Judges Dodge and Bingham, constituting the majority of the Circuit Court of Appeals, differed from Judges Putnam and Hale and decided that the return of the Cecilie was unjustified and the ship liable in damages to the libellants, basing their decision, not upon broad principles of maritime law, but upon narrow and technical reason-

ing to the effect that Captain Polack acted under orders from his directors; that therefore the return of the ship to the United States cannot be justified as a reasonable exercise of the master's discretion; and that notwithstanding the fact that a declaration of threatening danger of war had been proclaimed and that a proclamation of the existence of a state of war had been perfected, the statement in the message that war had broken out was not literally true. Judge Bingham goes so far as to say that "to permit the claimant to avail itself of the master's decision obtained under such circumstances, would be the equivalent of according to one the protection of a judgment which he had procured through fraud".

The majority of the court hold in effect that the owner on shore has no general discretion as has the master on the ship, and that war not having actually been declared when the ship was turned, there was no arrest or restraint within the meaning of the exception in the bills of lading, *and that there could be no arrest or restraint before the existence of an actual state of war.*

POINTS.

I.

The decision of the Circuit Court of Appeals is in conflict with the Styria, 186 U. S., 1.

In the *Styria* case the facts were as follows:

The *Styria*, an Austrian steamship, sailing from Thieste *via* Sicilian ports to New York, took on

board at Port Empedocle, Sicily, a quantity of sulphur for New York. She reached Port Empedocle on April 21, 1898, and her master began at once to load on board the sulphur in question, and by April 24th it was all on board and bills of lading, excepting "restraints of prices and rulers, or people," had been signed, and the vessel cleared from the Custom House, and was ready to proceed on her voyage to Messina and Palermo for a cargo of fruit, and thence to New York. In the meantime, unknown to the master, war had broken out between the United States and Spain, and on April 22nd, the first act of war, the capture of a Spanish merchant steamship, the Buena Ventura, was committed. On April 25, the Queen Regent of Spain issued a decree announcing the existence of war, and declaring sulphur, among other things, to be contraband.

On April 23, the master of the Styria received a telegram from Burrill & Sons, her managing agents in London, directing him not to sail until further orders; and on April 25, another telegram directing him, "to discharge whole cargo as quickly as possible," without assigning any reason for this order. The master had by this time learned that war existed, and that sulphur was contraband. In obedience to the instructions from the managing agents, as well as because he saw in the newspapers that sulphur was contraband, the master began to reland the sulphur at Port Empedocle on April 27, and had it all unloaded and warehoused by May 7th. On April 30th and May 2nd the shippers of the sulphur protested against the unloading.

The exportation of sulphur is one of the principal industries of Sicily and immediately after the declaration of war, Sicilian merchants urged

the Italian Government to request Spain to exempt it from the list of contraband. The representations of the Italian ambassador in Madrid, resulted in a declaration by the Spanish Government, that it would permit sulphur to pass free, and would advise its naval commanders to that effect. The negotiations between the Italian and the Spanish Governments were published in the Italian newspapers and it was also reported that the negotiations would be, and later that they had been, conducted to a successful termination.

On May 5-6, the Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, which read in part as follows: "*I would also state that, in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free.* (*Signed*) *The Minister, Coeco-Ortu.*"

These reports were read by the master of the Styria.

The sulphur was not wholly discharged until May 7th. In the meantime "a vessel which lay alongside the *Styria* at Port Empedocle, loading sulphur, sailed before she did, and arrived at New York in safety on May 19th. *Two other vessels laden with sulphur came safely from the Sicilian Port of Licata to the United States about the same time, and no ships were taken by Spain during the war*" (p. 7). The master, acting under the orders of the agents, which were in accordance with his own judgment, as he did not think the newspaper reports sufficiently "authentic", sailed without the sulphur.

The District Court held that the discharge of the cargo was too hasty and precipitate and not justified by the facts of the case.

On appeal to the Circuit Court of Appeals, it

was held that the sulphur was rightly discharged, but should have been re-loaded before the Styria left Port Empedocle.

The case having been brought to this Court by a writ of certiorari, it was held that the master was justified in landing and storing the cargo, and that it was not made his duty by the facts brought to his notice to re-ship the sulphur on the Styria and further delay the voyage.

The Circuit Court of Appeals has unsuccessfully attempted to distinguish the present cases from the *Styria* in three important particulars:

(a) In the present cases the majority of the Circuit Court of Appeals refuse to justify the return of the *Cecilie* as an exercise of her master's discretion, upon the ground that, having received from his owners an order to put back, he was deprived of all discretion. In this connection Judge Dodge says (p. 437):

> "The owner of the ship had the burden of proving circumstances actually existing at the time, sufficient to justify such an exercise of discretion on the master's part, present to his mind when he turned back; and also an actual exercise of such discretion by him in view thereof. I have been unable to agree with the finding below that this burden was sustained."

If this statement be correct, the owner must prove three facts:

1st. That circumstances actually existed which would justify the master in turning back.

2nd. That the master had full knowledge of all these circumstances when he turned back, and

3rd. That in turning back there was an "ac-

tual exercise" of such discretion by him "in view thereof".

It would not be sufficient for the owners to prove that when the ship turned back there had been an actual declaration of war between Germany and England, France and Russia, nor would proof of the additional fact that the master was fully informed of such declaration be sufficient unless they could show that in turning the ship the master acted entirely upon his own judgment and discretion, without any order or suggestion from the owners, who were on shore and in a position to have the best possible information as to actual conditions.

Later the learned judge says "the owner's direction to turn the ship back appears from the evidence to have been a specific and unqualified order, leaving the master no choice but to obey. * * * By assuming to direct from Bremen, as it did, the course which the ship should take, her owner assumed, for itself and its ship, all such responsibility and lost all right to charge the master with any share thereof" (p. 438).

In this connection the majority of the Circuit Court of Appeals have ignored the fact that in the case of *The Styria*, and in the case of *Nobel's Explosives Co. v. Jenkins* (L. R. [1896] 2 Q. B., 326), approved in *The Styria* case, the masters acted under orders received from their owners which were just as peremptory as the order received by Captain Polack.

In *The Styria*, Mr. Justice Shiras, writing the opinion of this Court, referred (p. 11) to a suggestion that had been made by the District Judge and repeated in the argument for the libellants "to the effect that the master was guided in his action in discharging contraband cargo by the

telegram from Burrill & Sons, the managing agents in London rather than by his own judgment on all the circumstances known to him at the time". In disposing of this contention the learned justice says:

> "This does not appear to be supported by the testimony of the captain, which is the only evidence on the subject. It is true that he did state that he acted under instructions of the agent but he also said, in reply to questions put on cross-examination as follows:
>
> 'Now, Captain, you say that you put this brimstone ashore on instructions of the managing owners? Answer: Yes, and also because I knew that the war was there and I acted on the bill of lading clause. Question: You have testified, haven't you, that all this you did by orders? Answer: No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deemed it not safe to proceed with the cargo that was declared contraband of war.' "

Justice Shiras then proceeds as follows (p. 20):

> " 'Without transcribing all of the master's testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with the contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have said, had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so. So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judg-

ment, exercised apparently in good faith on their behalf.

In the case of *Nobel's Explosives Co. v. Jenkins*, just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the ship owners, if it were possible to get it before the emergency was over; and all that can be said is, that there was a concurrence of judgment between the ship agents and the master as to what was the proper course to pursue.'"

In the present cases there were certain facts which made Captain Polack's position one of peculiar responsibility.

The *Cecilie* was one of the most valuable vessels afloat, having cost approximately $4,500,000, and carried 1892 persons of practically every nation which subsequently became involved in the war, principally Germans (pp. 302-303). A great number of these persons would be subject to arrest if war should break out while the ship was in Plymouth, Cherbourg or Bremerhaven.

The ship carried mixed cargo consigned to German consignees at Bremen, of which the total value was $139,335 (pp. 10, 11, fols. 40, 41).

The sailing of the *Cecilie* with a large amount of gold bullion was contemporaneously published in the leading newspapers of America and Europe, and was given great notoriety throughout the world (p. 308, fol. 1233), and Captain Polack had reason to assume that enemies' vessels would keep a bright lookout for so rich a prize.

The situation required the exercise of greater caution than in the case of an ordinary merchant vessel.

Before sailing Captain Polack had kept in touch with the political situation and knew in a general way how events had been developing, and after leaving New York he received, from time to time, wireless messages informing him as to the progress of events.

These news items were published in the "Ocean Gazette" a newspaper printed on the *Cecilie* (Libellant's Ex. 3, pp. 232-4; Libellant's Ex. 2, pp. 229-31).

The news thus received indicated that the situation was becoming more and more acute.

On July 29th the Gazette published a wireless dispatch from London announcing the formal declaration of war by Austria against Servia and active hostilities between the two countries; the refusal of Germany and Austria to accept the proposal of Sir Edward Grey for a conference of ambassadors of the powers in London; the issuance of orders for the German fleet to concentrate in home waters and an announcement that the British fleet and second battle squadrons were in readiness for service; a dispatch from Berlin to the effect that the Russian forces had occupied positions near the frontier of Russian Poland and that a squadron of German cavalry had also advanced to the frontier; an announcement that Emperor Franz Josef had granted complete amnesty to all Austro-Hungarian subjects who had deserted from the army or who had emigrated to other lands to avoid military duty.

On July 31st, the Ocean Gazette published the following news items:

An ultimatum from Germany to Russia demanding an explanation for the latter's mobilization, the answer to be given within 24 hours; fighting between Austrian and Servian forces at several points; a report that the southern column of Aus-

trians in Bosnia was watching the Montenegrin troops, and that in a severe battle in Bosnia the Austrians had defeated the Servians, with many killed on each side; an announcement that the gravity of the international situation was recognized in all European capitals; that Russia was proceeding with her mobilization of a large number of troops while the French defensive forces were taking extensive precautions; that business was practically suspended on the London Stock Exchange pending the serious war situation and that dealers refused to make prices; that the consols had reached a record low price of 69½, the lowest in a century, and that seven failures were reported; that the St. Petersburg, Vienna, Budapest and Brussels Exchanges remained closed and that two failures had been announced on the Glasgow Exchange; a declaration by the Shimbum, a semi-official newspaper of Japan, that if England were attacked, Japan would give assistance to the British arms, and a dispatch from Washington to the effect that administration officials were awaiting additional developments in European politics, and that if nations other than Austria and Servia were drawn into the conflict, a proclamation of neutrality covering the entire situation would probably be determined upon by the State Department.

The news received during the eastbound voyage increased Captain Polack's anxiety. He discussed the matter with his chief officer on the night of July 30th and, as he expressed it, he was very anxious to "get news from home about the political situation and about this war". All the news he received indicated that the situation was rapidly becoming more critical so that when he received the message from his managing di-

rectors, whom he assumed to be well-informed, the course which appealed to his best judgment as the best one to pursue was to turn back to the United States and not run into any danger; that seemed to him the best and only course (p. 260).

The wisdom of this course was fully confirmed when on the following day he received the wireless message from the Imperial Marine Office.

In the cases at bar the master's judgment was based upon (a) the information he obtained before sailing; (b) the information he obtained on the voyage indicating the increasing gravity of the situation, and (c) the information acquired from his directors at Bremen, and later confirmed by that received from the German Imperial Marine Office.

All the facts pointed irresistibily to the conclusion that the return to the United States was the only safe course to pursue.

In the case of the *Styria* the master received a peremptory order from his owner's agents to leave the sulphur at Port Empedocle. While his earlier information was that sulphur had been declared contraband, he was later informed, through the publication of an official declaration from the Italian Minister of Agriculture, that the Spanish Government had agreed to let sulphur pass free. This later information he chose to ignore, not considering it sufficiently "authentic".

If Captain Polack had, in turning back, acted contrary to his own judgment, the question of justification might have arisen, but we confidently submit that in this respect the present cases are on all fours with the case of *The Styria*, and that in these cases, as in the *Styria* case, although the master received instructions from his owners,

there was a concurrence of judgment between them as to what was the proper course to pursue.

(b) The majority of the Circuit Court of Appeals hold that the return of the *Cecilie* was due to an apprehension of a non-existent future restraint, but that to justify the return there must be "an actual and operative restraint, and that no merely expectant and contingent restraint affords sufficient excuse" (Judge Dodge's Opinion, p. 442).

In so holding the majority of the court ignore the fact that in the *Styria* case there was no actual restraint or danger, either existing or *in futuro*, because the Spanish Government had agreed to permit sulphur to pass free, and during the Spanish-American war this permission was never rescinded.

(c) The majority of the Circuit Court of Appeals attempt to distinguish the present cases from the case of *The Styria* by reason of the fact that in the *Styria* case the bill of lading contained a stipulation that the ports of delivery should be safe (Judge Dodge's Opinion, p. 442), entirely ignoring the fact that in the *Styria* case this stipulation was immaterial and inoperative for the reason that the port of New York was the port of destination and it was not even suggested that this port was at any time unsafe. This court's decision in the *Styria* case did not in any way depend upon this stipulation in the bill of lading, but was upon broader principles of maritime law which should determine the present cases as well. This is also true of the English cases.

(d) The majority of the Circuit Court of Appeals hold in effect that to justify the return of

the *Cecilie* an actual state of war must have existed at the time when the deviation occurred, and that no authority exists in law for any other view.

His Honor, Judge Dodge, says (p. 444):

> "But no case is found in which, there being no actual state of war, abandonment of a contract like this has been excused under the exception here relied on, because of mere apprehension that actual war might exist before delivery according to the contract could be made."

This we submit is an erroneous statement of the law which if permitted to stand will cause great confusion.

In *The Teutonia*, L. R., 4 P. C., 171, approved by this court in the *Styria*, the master deviated from the port of Dunkirk, his port of destination, upon information that war had been declared between Prussia and France, *the fact being, however, that war had not been declared and was not in fact declared until three days after such deviation.*

II.

In the circumstances disclosed by the record, the North German Lloyd Directors were not only justified in sending out their wireless message, but it was their duty to do so. The performance of this duty cannot create a liability.

The causes which impelled the directors to dispatch the message to Captain Polack are fully set forth by them in a statement which is stipu-

lated into the record (pp. 348-352). As this statement is of vital importance, as showing justification for the recall of the *Cecilie*, we venture to reprint it in full.

> "Up to Wednesday, July 29th, the interpretation of the political situation, which, of course, was followed by us with the greatest attention, from the time of the ultimatum sent by Austria to Servia, and the conflict of interests resulting therefrom, between the powers interested directly or by alliance was essentially a quiet and optimistic one, on the part of the Board of Directors of the North German Lloyd, as up to that time a restricting of the conflict to the powers immediately interested therein, namely, Austria and Servia, was counted upon, and we did not believe as yet in the active participation of Russia and France on the one side, and Germany on the other.
>
> Accordingly, the Board of Directors did not as yet see any reason for any immediate decision in regard to the further movements of our ships.
>
> In this interpretation of the Board of Directors there occurred a decisive change on the evening of the day mentioned, July 29th, owing to the fact that Captain Bartling, the manager of our nautical department, returning from a trip to Berlin on matters concerning his department, brought with him information in regard to a very serious interpretation of the political situation of various governmental officers; according to which it was already being seriously considered there that the remaining European great powers could be drawn in the pending conflict, and that there could be a general European war.
>
> After the return of Captain Bartling, the members of the board of directors at Bremen held a meeting during the night to discuss the measures to be undertaken. They determined to delegate a member of the board of

directors to proceed to Berlin in order that he might make inquiry of government officers and obtain information in regard to the development of events. Baron von Plettenberg was chosen to proceed to Berlin and he started that night.

Special attention was paid by the Board of Directors to the Steamer *Kronprinzessin Cecilie*, after her departure from New York on Tuesday, July 28th, as this ship, owing to her route, had to appear endangered, in case of the breaking out of war, and also required our special attention, owing to the high value of the ship and the cargo.

Upon instructions of the Board of Directors, the Nautical Department figured out exactly what was the latest time that the vessel would have, to receive an order in regard to the continuation or interruption of her journey, and we reached the conclusion that according to the supply of coal on hand, and the duration of the trip in question, the Board of Directors would have to come to a decision in regard to this by latest during the early hours of the afternoon of Friday, July 31st.

In this connection it was also taken into consideration that owing to the great congestion of the cable and wireless connections, a longer period of transmission of our telegram would have to be figured with. A period of time which actually from the departure of our telegram, July 31st, 2:45 p. m. until its receipt on board of *Cecilie*, July 31st, 10:09 P. M. true time of place, even exceeded our expectations and actually resulted in the fact that the *Cecilie* could no longer return to New York in compliance with our order, but had to select the shorter route to Bar Harbor.

The mission of Baron von Plettenberg, who arrived in Berlin on July 30th, in the morning, did not bear any positive results on this first day, as he could not obtain any

decisive information and indications from the government offices visited by him, in regard to the probable further development of the political situation.

Accordingly our interpretation of the political situation was still a predominantly confident and hopeful one on this day, July 30th, and we allowed our steamer *Main* to leave Bremerhaven for Antwerp as scheduled.

However, on the evening of this day, July 30th, there was issued a general warning to the German Merchant Marine Service, through the Admiralty Staff. This warning, which became known to us the same evening, constituted the first official sign for us of the very serious interpretation of the political situation by the German government, and caused us, beginning with this period of time to begin sending the first telegraphic instructions for our vessels in regard to the further procedure of their trips.

On Friday, July 31st, shortly after 2 o'clock in the afternoon, we received from Baron von Plettenberg, the telegraphic information that he had learned from an authoritative source that the declaration of the state of war, 'Erklarung des Kriegszustandes fur das deutsche Reich wegen drohender Kriegsgefahr,' had been perfected, and would shortly be made public.

This 'declaration of the state of war for the German Empire, owing to the "threatening danger of war" ' was then, soon afterwards, at 4:16 in the afternoon, brought to our knowledge by a telegram of the Imperial Marine Office, and the respective Imperial decree was publicly proclaimed on the same afternoon at about 5 o'clock, in Bremen also.

On the basis of this telephonic advice from Baron von Plettenberg, the telegram was sent to Captain Polack immediately at 2:45, upon the resolution of the members of the Board of Directors assembled at Bremerhaven, recalling the *Cecilie* to New York.

39

The decree of the state of war for the German Empire, as quoted above, communicated to us by Baron von Plettenberg, offered to the members of the Board of Directors who participated in this resolution, the immediate reason for the recall of the *Cecilie*.

Compared with this decree of a state of war, all other political advices and facts which he had at the time, as expressed in the newspaper material are only of secondary and minor importance of a commentary and explanation of this governmental decree, from which could be seen the causes and gradual developments of the conflict, and the enemies to be expected in case of the breaking out of the war, which however, in itself, and without the supplementary act of the government in declaring the state of war would not, as yet, have caused us to take immediate actions in regard to our vessels.

Therefore this decree of a state of war alone can be designated as the decisive fact inducing us to recall the *Cecilie*. * * *

Consequently the considerations which induced us to recall the vessel were to the effect that according to this declaration of the state of war, Kriegszustandes, the outbreak of the war could be considered as most probable."

The majority of the Circuit Court of Appeals hold that these facts did not justify the directors in recalling the *Cecilie*. Judge Bingham characterizes the information contained in the telegram as false and holds that "to permit the claimant to avail itself of the master's decision obtained under such circumstances would be the equivalent of according to one the protection of a judgment which he had procured through fraud."

We submit that this characterization is unjust to the claimant and unwarranted by the facts.

The proclamation of threatening danger of war

followed by the Government warning to German shipowners, and the second proclamation of the existence of a state of war indicated in precise terms the danger to be apprehended, and although the declaration of a state of war did not in itself amount to a declaration of war against any power, it was fully understood by the North German Lloyd directors what governments were involved. In the circumstances the proclamation of the existence of a state of war, carrying with it a declaration of martial law, was equivalent to all intents and purposes to the outbreak of war, certainly so far as the future guidance of the North German Lloyd vessels was concerned.

In phrasing their wireless message as they did, there was no thought in the minds of the directors of deceiving any one, but they were concentrated upon conveying the most precise information to their captain of the seriousness of the situation, as they viewed it.

The directors' reasons for saying that war had broken out are expressed, in their own language, in their further statement which has been stipulated into the record (pp. 355-356):

> "The reason why we stated in our telegram to the *Cecilie* that the war had broken out, whereas, up to that time, as a matter of fact only the proclamation of a state of war, owing to the threatening danger of war had been issued, are the following:
>
> First of all, according to the proclamation of the state of war, of which Baron von Plettenberg advised us, the breaking out of this threatened war within the next 24 hours could be expected with the greatest probability.
>
> Secondly, we stated ourselves, when sending off the telegram that every other information in regard to the political situation, every statement that was not absolutely

clear and comprehensive in regard thereto, was inadvisable, and could only lead to misunderstanding and unsafe resolutions.

The sole information that the state of war had been proclaimed would probably have been incomprehensible to the Captain, who, of course, would not have been familiar with the regulations of political law.

Only the information that war had already broken out could show him the political situation in the same degree of distinctness and clearness with which we viewed it here, and told him to observe in the further guidance of the vessel the deportment and care which we considered absolutely necessary here, just as if the war had actually broken out here.

Furthermore we had to count on quite a long period of transmission for our telegrams, during which time, therefore, a further aggravation of the situation in the direction of war was to be expected, and we also had to take into consideration that if the breaking out of war had actually occurred, it would most probably have been impossible for us to advise the vessel of this at that time on account of the isolation or interruption of the telegraphic connections.

The wording of our telegram, therefore, occurred purposely in the form that we reported the war as already having broken out, and has nothing to do with the wording of our telegram code."

We submit that in turning the ship Captain Polack exercised a wise discretion for the benefit of all interests committed to his care, basing his judgment upon information amply sufficient to justify his decision. The information contained in the wireless message, if received from any other source, would have required him to return to the United States, and the fact that the information was received from the Managing Directors cannot change the situation.

If, however, the court is of the opinion that the effect of the wireless message was to substitute the authority of the directors for that of the master, we confidently submit that the facts within the knowledge of the directors not only justified them in recalling the *Cecilie*, but that a moral and legal obligation rested upon them to adopt the precise course which they pursued. A proclamation of threatening danger of war had been issued; a general warning had been sent out to German vessels by the Imperial Marine Office and they had received information from an authoritative source that a proclamation of the existence of a state of war, carrying with it a declaration of martial law, had been perfected and would immediately be published, and that short time ultimata would at once be sent to Russia and France. They knew that if they waited later than the afternoon of July 31st they would be unable to recall the *Cecilie* to the United States on account of coal shortage; they knew that she could not in ordinary course reach Plymouth, her first port of call, until the morning of August 3rd; that she could not cross the Channel and reach Cherbourg until some hours later, and that she could under no circumstances reach her home port of Bremerhaven before August 4, and that to reach her home port it would be necessary for her to pass through the full length of the English Channel and the Straits of Dover, encountering war vessels which were sure to be on the lookout for her.

The libelants have taken the position that the delivery of their gold at Plymouth and Cherbourg is the only question which concerns the Court, entirely ignoring the master's and owners' duty to the passengers, crew and German cargo owners.

In fact counsel for the libelants admitted in open court that it was extremely improbable that the *Cecile* could have arrived safely at Bremerhaven, which admission is referred to by the District Judge in his opinion (fol. 1600). Counsel asserted that this did not relieve the ship of her obligation to deliver their gold at the ports of destination.

Neither the master nor directors were under any obligation to sacrifice the ship, and the duty rested upon the directors, as well as on the master, to adopt reasonable precautions for the protection of the German cargo which would be subject to seizure in an English or French port, and the passengers of various nationalities, many of whom would be arrested in either of the ports of call or in the port of ultimate destination.

Wireless telegraphy furnished a method of communication with the ship, but the directors knew that as the crisis culminated, this method was becoming more and more uncertain, and would finally be entirely cut off, and the duty rested upon them to communicate with Captain Polack while they still had the opportunity. The dispatch of the wireless message was not the hysterical act of a panic-stricken director, but was the wise precaution of a well-informed board taken for the benefit of all concerned after painstaking inquiry and careful consideration of all the facts.

Wireless telegraphy does not deprive a shipmaster of his discretion but the obligation rests upon the owner on land in case he acquires information of danger threatening the ship, passengers or cargo to communicate with his master and give him appropriate instructions for the common safety. To hold that by so doing the owner is incurring liability would be contrary to public policy, for

it would discourage owners from utilizing an obvious means of safety.

If the officers and directors of a corporation which owns a ship owe a duty to passengers, crew and cargo as well as to the ship itself to use modern means of communication to inform the master of the ship of impending dangers which come to their knowledge such duty must carry with it a corresponding right. If the duty be to protect the different interests from threatening danger then when the duty is performed liability cannot grow out of the performance of it. Such officers and directors in these days of wireless telegraphy may, on account of their situation and their ability to command such means of communication, owe the duty of taking even peremptory action for the protection of all interests. But if they do owe such duty and exercise their best judgment they are entitled to the benefit of it. Every consideration which makes the judgment of the master controlling and effective as relating to all interests must operate to give the same effect to the judgment of the owner when he is required to act for the protection of all.

III.

To exonerate the ship it was not essential that both ship and cargo be exposed to a common peril.

In *The Teutonia* (1872) L. R., 4 P. C., 171, the court says:

> "It was argued, however, on the part of the appellants, that, to justify this course,

both ship and cargo must be exposed to a common peril, whilst in the present case the cargo, being the property of a neutral owner, would have been in no danger from being carried into a French port, and it was argued that though the master might be justified in deviating from the direct course of the voyage for the purpose of avoiding a danger to which the ship and cargo were exposed, although it might afterward turn out that the information upon which the master acted was incorrect, yet that if the reported danger was to the ship alone the master must commit a breach of contract by deviating from the direct course of the voyage unless the danger actually existed, and the master could allege that he was prevented by one of the perils excepted in the bill of lading from pursuing his voyage in a direct course. It appears to their Lordships, however, that there is no sound ground for this distinction; if the cargo had been a Prussian cargo it would have been exposed to the same danger as the ship from entering the port at Dunkirk, and it appears to their Lordships that when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship."

Followed in *The San Roman* (1873) L. R., 5 P. C., 301.

IV.

The questions arising in the present cases are of both national and international importance, and the matters involved are in themselves of sufficient importance and sufficiently open to controversy to justify the granting of a writ of certiorari.

(1) *The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in The Styria, 186 U. S., 1.*

The points of conflict have already been discussed (*supra*, pp. 8-19).

(2) *A great number of vessels are in a situation similar to that of the "Kronprinzessin Cecilie".*

The record shows that on July 30th and 31st, 1914, 23 ships of the North German Lloyd and the ships of the Hamburg-American Line, Hansa Line and Standard Oil Company of New Jersey (which were under the German flag), upon receipt of advices from their respective owners, either returned to their ports of departure or sought or remained in neutral ports; that no German steamer left Hamburg or Bremerhaven for any foreign port after August 1, 1914, and that the last English bound steamers of the Argo Company which left Bremerhaven on July 30th for London and Hull, upon instructions from their

company returned to Bremerhaven August 1st without having discharged (Stipulations, p. 352, fol. 1408; p. 354; p. 357, fol. 1426).

The uniformity of the action taken by all German ships would seem to indicate sufficient ground for apprehension of danger, but Judge Dodge in his opinion (pp. 446-7) says that the owner's evident object was "not to avoid actual immediate danger of capture or detention then threatening these ships, but to keep them all as far removed as possible from any and all such regions of possible future danger". This view, if sustained, would lead to incalculable results.

(3) *The amount involved directly and incidentally.*

The libelants in the present cases demand $2,240,106.69 damages for the failure of the ship to deliver their gold at Plymouth, England, and Cherbourg, France. Other consignors shipped on the same steamer gold and silver bullion of the value of several million dollars, with respect to which shipments no suits have, as yet, been commenced.

If this decision be permitted to stand, not only these other shippers of bullion, but also shippers of cargo on all the other German ships whose voyages were interrupted will be encouraged to commence suit, resulting in interminable litigation. The total amount of these claims would, if allowed, be sufficient to bankrupt the German companies.

(4) *The cases are of international importance in that they affect all vessels of the German Mercantile Marine over which or over whose owners the United States Courts have jurisdiction.*

By reason of British control of the seas Teutonic vessels particularly were in a position of grave peril, and claims of the kind now in question will, if this decision be permitted to stand, be enforced against Teutonic vessels alone. It is peculiarly desirable that a decision of such far-reaching importance, affecting vessels of but one of the belligerent powers, should be reviewed by the highest court of the land.

(5) *Changes in the means of communication between owners on shore and their masters at sea, due to the invention of wireless telegraphy and the like, render it desirable that their rights and obligations as between themselves and as between them and the public should be fixed by the highest court.*

The majority of the Circuit Court of Appeals apparently consider that the adoption of modern methods of communication between owners and masters has deprived the latter of their discretion, and that while a loss through a peril excepted in a bill of lading will not render a ship liable to the cargo owner, a loss incurred in the avoidance of an excepted peril will, at the present time, fix a liability upon the ship, if information of the peril and the proper way to avoid it has been received by the master from the owner on shore.

The introduction of wireless telegraphy has greatly increased the safey of shippers, but if this decision be permitted to stand, the adoption of precautions by a master for the safety of his ship and the cargo, based upon information received from the ship owner, would involve the latter in a liability from which he would be free if the same

precautions were adopted upon information received from a different source.

(6) *The effect of the order of the German Imperial Marine Office.*

The record shows that on July 30, 1914, the German Admiralty Staff issued a general warning to the German Merchant Marine Service, and that on August 1, 1914, the Imperial Marine Office sent out a wireless message in the Government Code to all ships of the German Society for Wireless Telegraphy, which read: "Threatening danger of war. Do not touch at any port England, France, Russia" (Record, p. 259, fol. 1033).

This message, which was received by Captain Polack of the *Cecilie* on August 1st, raises the important question as to whether the order in itself does not constitute a "restraint," having been given by a branch of the German Government to a German ship after the proclamation of a state of war, which was in effect a declaration of martial law for all Germany.

Aside from its mandatory character the message was of the greatest importance as indicating that the situation was so grave that in the opinion of the German Government no German ship should touch at any of the ports mentioned; and yet the majority of the Circuit Court of Appeals have not even mentioned this message in their long and elaborate opinions, and in the face of this declaration of the German Government have decided that British and French ports were safe on August 1st and that they continued to be safe as late as August 3rd, and have held in effect that the owners and master of the *Cecilie* should have set up their own judgment against that of their Government.

(7) *The rules governing the rights and duties of foreign ships when their nations are in, or verging upon, a state of war are of national and international importance.*

For manifest reasons the rules governing the rights and duties of foreign ships when their nations are in or verging upon a state of war should be prescribed by the highest court of the land.

(8) *The majority of the Circuit Court of Appeals confuse principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading.*

The majority of the Circuit Court of Appeals have held in effect that because in their opinion the circumstances of the present case would not justify an abandonment for a total loss, if the ship or cargo were insured under a policy covering losses through arrest or restraint, it necessarily follows that there was not such an arrest or restraint as to bring the cases within the exception in the bill of lading.

Policies of insurance are contracts of indemnity and in order to justify a recovery the insured must prove, first, that there has been an actual loss of the thing insured, and second, that the proximate cause of the loss is specifically covered by the policy.

To warrant a recovery under a policy of insurance covering arrest and restraint of princes, etc., it is not sufficient to show that the subject of insurance was *in danger* of loss, or that a loss was actually sustained through *fear* of a peril insured against.

In England a technical and strict rule of interpretation has been applied to losses of this char-

acter, and it has been held that even where delivery of a cargo at the port of destination has been prevented by an effectual blockade, and the master, in order to avoid the risk of certain capture put into another port or returned to the port of departure, the loss was one due to the *fear of capture*, and not to one resulting from the peril insured against.

Through all these insurance cases runs the same principle, viz., that to justify an abandonment and claim for a constructive total loss, the peril insured against must have operated *directly* upon the subject of insurance. While the Supreme Court of the United States and the Courts of New York and Pennsylvania have slightly modified the application of the English rule, they still adhere to the principle that the insured peril must operate directly, and not circuitously, upon the subject of insurance. The distinction is not one of principle, but in the application of the principle.

In *Olivera v. Union Ins. Co.* (3 Wheat., 183), an action was brought on a policy in favor of Spanish subjects on a cargo from Baltimore to Havana. The vessel having sailed and being near the mouth of the Chesapeake, February, 1813, the master descried four British frigates, officers from which boarded his vessel and indorsed upon the papers that the Bay of Chesapeake was under blockade, and ordered him to return, and not again to attempt to go out. The blockade was not known in Baltimore when the the vessel sailed. The voyage was thereupon given up, and the cargo abandoned to the underwriters. This loss was held to be covered.

Marshall, C. J., delivering the opinion of the court remarked that an embargo was admitted to be a peril within the policy and added, "The ap-

plication of force is not more direct on the vessel stopped in port by an embargo, than on the vessel stopped in port by blockading squadron."

In commenting on this decision Mr. Phillips in his work on insurance says, "A distinction is made by the court in this and also a subsequent case, between occlusion in a port, bay, or river, and an exclusion from it; the former being held to be an arrest, restraint and detention within the policy; the latter, not so." *Phillips on Insurance*, Vol. 1, Sec. 1114.

In all these insurance decisions we find an apprehension in the mind of the court, that, to allow a claim for a constructive total loss by arrest or restraint where the thing insured was not actually lost by the *direct* operation of one of these perils, would afford to the insured an inducement to create imaginary dangers whenever the cargo is not likely to reach the port of destination in a sound state, or where the owner has reason to believe that his venture, if carried out, will be unprofitable.

This is well expressed by Lord Alvanley, Ch. J., in *Hadkinson v. Robinson* (3 Bos. & P. 388):

> "*If we were to decide that the sale at Port Mahon was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and by giving notice of abandonment, to throw a loss upon the underwriters to which they are not liable by the terms of the policy.*"

There is also the further consideration that inability to complete the voyage does not necessarily result in the total destruction of the thing insured.

This is aptly expressed by the Lord Chief Justice in the case last cited (392):

> "But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoid that port, whereby the object of the voyage is defeated, *such circumstances do not amount to a peril operating to the total destruction of the thing insured.*"

Very different considerations enter into the determination of cases arising under bills of lading.

> "Bills of lading contain an undertaking by the shipowner or carrier to deliver safely the goods set forth in them, unless prevented by certain perils known as 'excepted perils' or exceptions, provided that such perils and their consequences could not have been avoided by reasonable care and diligence on the part of the shipowner or carrier and his servants."
>
> *Scrutton on Charter-parties and Bills of Lading*, 7th Ed., p. 195.

A bill of lading constitutes the contract between the shipper and carrier, and where the latter undertakes to exercise reasonable care to prevent a loss from an excepted peril, there is a correspond ing assent by the former that the carrier may adopt reasonable precautions to avoid such peril. *It would be an absurdity to hold that the performance of a duty creates a liability for damages.*

In the case of a policy of insurance, if an insured peril be the proximate cause of the loss, it is immaterial that some other cause may have contributed to the loss, as for example, the negligence of the insured's servants.

In the case of a bill of lading, even though the

excepted peril be the proximate cause of the loss, this will not protect the carrier if the negligence of his servants be a contributing cause, nor if after a loss without such contributory negligence, they fail to take reasonable care to minimize the damage. In the latter case the carrier will be responsible for the increased damage although not liable for the original damage.

Notara v. Henderson, L. R. 7 Q. B., 225.

While the maxim "*causa proxima, non remota, spectatur*," has been held to apply to policies of insurance it does not apply to bills of lading.

So if "restraint of princes" be covered by a marine policy and excepted by a bill of lading, in the former case, to render the underwriter liable, the restraint must "operate directly" upon the subject of insurance, and a loss incurred in the avoidance of the restraint is not collectible.

As was said by Bailhache, J., in *Becker v. London Assurance Corp.* (1915) 3 K. B., 410, "*It is clear that the avoidance of a peril * * * is not the same as loss by the peril itself.*"

In the case of a bill of lading, however, it being the duty of the carrier not to expose the shipper's goods to a restraint, he incurs no liability by performing this duty, even if the precautions adopted involve a deviation from his course.

But discussion of this subject is of academic interest merely, for the courts of Great Britain and this country have uniformly refused to apply the insurance rule of construction to cases arising under bills of lading, notwithstanding the fact that in nearly all of the latter cases the libellants have insisted upon the analogy of the insurance decisions.

The true rule is as follows: *A reasonable apprehension of capture or other imminent peril justifies a master in deviating from his direct*

course and taking such steps as a prudent man would take for the purpose of avoiding danger, and in so doing he is entitled to consider the safety of his ship as well as the cargo, and the safety of the belligerant as well as of the neutral cargo.

In *Nobel's Explosives Co. v. Jenkins* (1896) 2 Q. B. Div., 326, although there was a probability of capture, if the ship in question continued on to Yokohama, her port of destination, that probability did not in any sense amount to a "practical certainty," nor had an arrest or restraint of princes, etc., commenced to operate when the master put into Hong Kong and discharged his contraband cargo. It was for fear, that if he continued on his voyage, the contraband cargo would be subjected to the excepted peril, that he discharged it at the port of Hong Kong.

And yet, had the contraband cargo been insured under a policy covering arrest and restraint, the probability of capture would not have justified an abandonment to the underwriters at Hong Kong; for fear of an arrest, is not the same as an arrest, and the peril insured against had not commenced to operate directly upon the subject of insurance.

In the case cited, Mathew, J., said (p. 331):

> "It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by a sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith* and *Rodoconachi v. Elliott* • • • I find that the captain in refusing to carry the goods farther, acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by re-

straint of princes and rulers within the meaning of the exception."

Later the learned judge said:

"But, apart from the terms of the bill of lading it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated. In the words of Willes, J., in *Notara v. Henderson*, 'a fair allowance ought to be made for the difficulties in which the master may be involved. * * * The place, the season—the opportunity, and means at hand, the interests of other persons concerned in the adventure, and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short all circumstances affecting risk, trouble, delay and inconvenience, must be taken into account.' I am of the opinion that the course taken by the captain in landing the goods and landing them in safe custody, was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

In *Pole v. Cetovich* (1860) 9 C. B. [N. S.] 430, the plaintiffs' counsel made precisely the same contention as is made by the libellants in the present case. They argued that the defendant's agreement was absolute and that the mere apprehen-

sion of capture was no justification for its non-performance. Byles, J., interrupted the argument by saying, "You say the defendant was bound by his contract. * * * The question is, whether the defendant was not bound to take all reasonable precautions to render the risk as little as possible." This case was cited with approval by the Privy Council in *The Teutonia* (1872) L. R. 4 P. C., 171, where the Court says: "It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of *Pole v. Cetovich* (9 C. B. [N. S.] 43), is an authority in point." In *The San Roman* (1873) L. R. 5 P. C., 301, the expression used by the Court is "an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience."

If the case of *Pole v. Cetovich* had arisen under a policy of insurance, it could not for a moment be contended that there had been a constructive total loss and no abandonment would have been justified, for the master refused to leave Falmouth because he apprehended danger from French cruisers if he proceeded to Copenhagen; but the danger from French cruisers never operated directly upon the ship or cargo, and the proximate cause of the plaintiffs' damage was not an arrest or restraint, but the refusal of the master to proceed on his voyage.

In all the cases we have cited the master was held justified in adopting reasonable precautions to avoid the operation of the excepted peril, even though such precautions involved a deviation from his course or an abandonment of the voyage. And yet, in not one of them, if the question had arisen under a marine policy covering losses incurred through arrest and restraint, would it have been held that there was a constructive total loss or that an abandonment to the underwriters would be justified.

(9) *Equal division of federal judges renders it especially desirable that the cases should finally be disposed of by this Court.*

These cases have been passed upon by four federal judges,—one sitting in the District Court and three in the Circuit Court of Appeals. Of these four judges two have decided that not only was the return of the *Cecilie* to the United States justified by the circumstances, but that it was the duty of the captain to act precisely as he did.

It would be unfortunate if such a divided opinion should be the final sanction for imposing an overwhelming liability on all German shipowners. The case is peculiarly one which calls for a final determination by this Court. The questions arising out of the present controversy are of both national and international importance and the matters involved are in themselves of sufficient importance and are sufficiently open to controversy to justify the granting of the writ. And all this is especially true in view of the present international situation.

The application is made at the present time for the following reasons:

(a) If the application were postponed until after the entry of a final decree, much time would

be consumed and expense incurred in taking proof of damages before a commissioner. Many other claims of great magnitude are dependent upon the determination of the principles of liability in these cases, and if, as we confidently believe, upon a review of the record, this court should hold that the *Cecilie* is not liable, the principle of liability will be determined for all other German ships in a like situation.

(b) The damages claimed by the libelants in these cases are so large in amount and speculative in character that it is impossible for the claimant to file a bond and thus release its ship. Indeed under existing conditions it would be absolutely impossible to give a bond, and if the libellants should undertake—as they might—to have the *Cecilie* sold, vast and irreparable damage might be done to the claimant before it would have opportunity to apply again for a writ of certiorari.

(c) The case is peculiarly one where a prompt decision is essential to the protection of the rights of the claimant.

It is hoped most earnestly that the Court will entertain this application at the present time as, of course, it has the power to do.

V.

It is respectfully submitted that the petition should be granted and a writ of certiorari issue as prayed in the petition.

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Counsel for Petitioners.

CONTENTS.

PAGE

Statement of the cases 1

Outline of historical events prior to the shipments in question 6

Statement of facts 9

Points,

I. The decision of the Circuit Court of Appeals is in conflict with The Styria, 186 U. S., 1 15

II. In the circumstances disclosed by the Record, the North German Lloyd Directors were not only justified in sending out their wireless message, but it was their duty to do so. The performance of this duty cannot create a liability 27

III. To exonerate the ship it was not essential that both ship and cargo be exposed to a common peril 38

IV. The uniform course adopted by all German shipowners in issuing warnings to their ships on July 30th and 31st, 1914, is in itself a clear indication that the interruption of the Cecilie's voyage was fully justified 41

V. To hold that the adoption of modern methods of communication, involving increased safety to shipping, enlarges the liability of shipowners, would be unreasonable and contrary to public policy 42

PAGE

VI. The order received by wireless from the Imperial Marine Office may, in itself, be considered a restraint. At least, it shows that in the opinion of the German Government, English, French and Russian Ports would not be safe for German vessels on and after August 1, 1914, and, therefore, constitutes authoritative and conclusive proof of the wisdom of Captain Polack's course 43

VII. The majority of the Circuit Court of Appeals have confused principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading 44

VIII. The libelants are not entitled to a refund of the prepaid freight 57

IX. The decrees of the Circuit Court of Appeals should be reversed, and the cases remanded, with instructions to dismiss the libels 63

INDEX OF CASES CITED.

Abbott on Merchant Ships and Seamen (14th Ed., 1901), pp. 664 et seq. 61

Allison v. Bristol Marine Ins. Co. [1876], L. R., 1 App. Cas., 209, 226 61

Becker v. London Assurance Corp. [1915], 3 K. B., 410 50

Burn Line, Ltd., v. U. S. & A. S. S. Co. [1908], 162 Fed. Rep., 298 59

Byrne v. Shiller [1871], L. R. 6 Ex., 319 61

Cargo ex Argos [1873], L. R. 5 P. C., 134, 155 61

Christy v. Row [1898], 1 Taunt., 300 61-62

De Silvale v. Kendall, 4 M. & S., 37 58

Express, The, L. R. 3 A. & E., 597, 26 L. T. N. S., 936 46

Hadkinson v. Robinson, 3 Bos. & P., 388 48

Hutchinson on Carriers (3d. Ed., 1900), Sec. 831 60

PAGE

Kimball, The [1865], 3 Wall., 37, 44 60

Maclachan's Law of Merchant Shipping (5th Ed., 1911), pp. 575-7 61

Nobel's Explosives Co. v. Jenkins, L. R. [1896], 2 Q. B. 326 ..... 19, 26, 51, 55

Natara v. Henderson, L. R. 7 Q. B., 225 ..... 50, 62

Olivera v. Union Ins. Co., 3 Wheat., 183 47

Paradine v. Jane, Aleyn, 26 53

Phillips on Insurance, Vol. 1, Sec. 1114 48

Pole v. Cetovich [1860], 9 Common Bench, N. S., 430 ..... 26, 53, 54

Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co., Ltd. [1904], 130 Fed. Rep., 860 57

Queensmore The, 51 Fed. Rep., 250, aff'd id. 1022 59

San Roman, The [1873], L. R. 5 P. C., 301, 26, 40, 54, 56

Scrutton on Charter-parties and Bills of Lading, 7th Ed., p. 195 49

Styria, The, 186 U. S., 1 ..... 15, 25, 55

Teutonia, The [1872], L. R. 4 P. C., 171, 26, 27, 39, 54, 63

7 Am. & Eng. Enc. of Law (2d Ed.), 246, 248, 59, 60

36 Cyc., 311 60

Supreme Court of the United States

OCTOBER TERM 1916.

NORTH GERMAN LLOYD, CLAIMANT OF STEAMSHIP KRONPRINZESSIN CECILIE,
Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,
Libelant-Respondent.

No. 922.

SAME CLAIMANT,
Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,
Libelant-Respondent.

BRIEF FOR NORTH GERMAN LLOYD.

*Certiorari to the United States Circuit Court of Appeals for the First Circuit.**

Statement of the Cases.

On October 21, 1914, the respondent, Guaranty Trust Company of New York filed its libel against S. S. *Kronprinzessin Cecilie*, belonging to the

*An alien enemy may defend and have the benefit of an appeal. McVeigh v. U. S. 11 Wall., 259, 267.

petitioner, North German Lloyd, seeking to recover $1,793,278.22 damages for an alleged breach of contract on the part of said steamship in failing to carry a consignment of gold bars from New York to Plymouth, England (Libel, pp. 1-5).

On November 16, 1914, the respondent, National City Bank of New York, also filed its libel against said steamship seeking to recover $404,150.06 for an alleged breach of contract on the part of said steamship in failing to carry a consignment of gold bars to Plymouth, and $32,007.43 for an alleged breach of contract in failing to carry another consignment of gold from said port of New York to Cherbourg, France (Libel, pp. 108-115). By amendment of its libel the claim of the Bank was subsequently increased to $446,828.47 (Amended Libel, pp. 134-142).

The petitioner, as claimant, filed its answers to these libels, which answers are substantially identical in form (Answers, pp. 7-15; 143, 116-128).

The answers admit the receipt of the gold bullion and allege that the carriage thereof was undertaken by the claimant subject to the conditions and exceptions contained in the bills of lading, and subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak, or threatened outbreak, of a European war. They admit that the steamship turned back on her course, but allege that at the time of turning she was about 1070 miles from Plymouth. They allege that the decision of the master to return to a United States port was based upon credible information re-

ceived by him from the North German Lloyd office, at Bremen, in a wireless message, that war had broken out, involving Germany with Russia, France and England, and that this message, considered in conjunction with the information with respect to the European crisis received by him prior to sailing, furnished reasonable ground for him to apprehend that the steamship and cargo would be captured if she continued on her voyage and required him in the exercise of sound judgment and discretion to put back to a port of refuge; that if war had not actually broken out at the time of the receipt of this wireless message, still the master, in anticipation of the outbreak of hostilities and the consequent danger of arrest of the members of his crew, the arrest or prolonged detention and discomfort of his passengers and the capture of his ship and cargo, would have been fully justified in adopting the precise course which he pursued (pp. 7-9; 143, 116-122).

The answers deny that the steamship had violated any contractual or other duty; admit that on or about August 8th the libelants accepted redelivery of the gold; allege that such redelivery was at the libelants' special request contained in two letters, copies of which are annexed thereto marked Exhibit B (pp. 18-20, 130, 131) and deny that by reason of the alleged failure of the steamship to deliver the gold at Plymouth as agreed libelants have suffered any damage (pp. 9-10; 119-120).

As a Second Defense, the answers set forth at length the facts in connection with the shipment of the gold, the incidents of the voyage, the

danger of capture had the ship proceeded on her voyage, and alleges that the action of the captain in directing the return of the steamship to the United States, where the rights of all those interested in both ship and cargo would be respected and protected, was in concurrence with the instructions received from her owners, and that such instructions, and the action following them, were fully justified by the circumstances, and were the exercise of a right given by the laws of the United States, as well as by Article 634 of the German Maritime Code, which provides in substance that if a war be declared after the commencement of a voyage in consequence of which a vessel or the goods shipped thereon can no longer be considered free and would be liable to risk of capture, either party has the right to withdraw from the contract without being liable to damages, and by Articles 669 and 670 of said Maritime Code and by other provisions of the laws of Germany (pp. 10-13; 122-6).

The answers further allege that the course pursued by the captain was entirely successful, and that his return to a port of refuge and the delivery of all the specie to the parties entitled thereto were accomplished without the capture or detention of a single passenger or member of the crew and without loss or damage to any of the specie or mixed cargo (pp. 13-14, 126).

As a Third Defense, the answers set up an exception in the bill of lading against liability for loss or damage "occasioned by arrest and restraint of princes, rulers or people" (pp. 14; 127).

As a Fourth Defense, the answers set up a provision in the bill of lading whereby neither the ship or carrier should in any case be responsible for a value greater than that declared by the shippers in the margin; it alleges that the value of the shipments in question was declared by the libelant in the margin to be as stated therein; that all the gold, representing said shipments and value so declared, was redelivered by claimant to the libelants at Bar Harbor and that immediately upon such redelivery all further responsibility of the claimant or its ship ceased (pp. 14; 127).

As a Fifth Defense, the answers allege that it was agreed that time should not be of the essence of the contract, and that the bill of lading expressly provided that the steamer should have "liberty to call at Intermediate Ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes", and that it was further agreed that the steamer should have liberty to put into a port of refuge, and that neither the steamer nor carrier should be liable for "loss or damage by prolongation of the voyage" (pp. 15; 128).

The cases were tried together (with two other suits brought by passengers) before the District Court for the District of Massachusetts, which entered decrees dismissing the libels (Decrees, pp. 405, 408).

Both libelants appealed to the United States Circuit Court of Appeals for the First Circuit which, by a divided Court, reversed the decrees of

the District Court and remanded the cases, with directions to enter interlocutory decrees for the libelants.

The opinions of Judge Hale dismissing the libels are printed in the record (pp. 368-401; 402) and also appear in 228 Fed. Rep., 946. The opinion of Judge Dodge, the concurring opinion of Judge Bingham and the dissenting opinion of Judge Putnam are also printed in the record (pp. 435, 447, 459) and appear in 238 Fed. Rep., 668.

Substantially all the facts are covered by stipulations which appear in the record (pp. 163-220; 310-315; 346-357). The material facts are stated in the opinion of Judge Hale and such statement is accepted in the opinion of Judge Dodge and in the dissenting opinion of Judge Putnam (pp. 435, 459).

Outline of historical events prior to the shipments in question.

On June 23, 1914, Archduke Francis Ferdinand of Austria and his wife, the Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia.

On July 23, 1914, Austria sent an ultimatum to Servia, and on the following day Russia urged Austria to abandon the time limit of her ultimatum "in order to prevent consequences incalculable and fatal to all the powers", and at the same time informed the other powers that if the Austro-Hungarian Government should make war on Servia, Russia could not allow the conflict to be settled between those two countries alone; France declared that she "would fulfill all the obligations entailed by her alliance with Russia, if necessity

arose"; the German Government declared that there was only the question of a matter to be settled between Austria-Hungary and Servia, and that other powers ought to reserve it to those two, because interference of another Power, owing to different treaty obligations, would be followed by incalculable consequences.

On the following day, July 25th, Austria declined Russia's request for an extension of the time limit in the ultimatum to Servia; Servia replied to the Austrian ultimatum; Austria advised Servia and the other powers that she considered Servia's reply unsatisfactory, and the Austrian Minister left Belgrade; Germany confined her Alsace-Lorraine garrisons in barracks, and placed the frontier works of Alsace-Lorraine in a complete state of defense, while the populace in Berlin made demonstrations in favor of war; Servia ordered mobilization; Russia began to take military precautions, and martial law was proclaimed in Austria.

On July 26th the Austrian Government ordered mobilization against Servia; the Servian army began mobilization; Belgium increased her army to enforce neutrality; the German fleet was concentrated in home waters and the German Ambassador at St. Petersburg was directed to make the following declaration to the Russian Government:

"Preparatory military measures by Russia will force us to counter measures which must consist in mobilizing the army. But mobilization means war. *As we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France.*"

On the same day Sir Edward Grey proposed to the Powers a conference in London; Austria notified the Powers that the refusal of Servia to accept the Austrian demands in full, without reservations, would compel Austria to force Servia by the most drastic measures to a complete submission; Russia announced that she could not be asked to allow Servia to be crushed; the German fleet in Norway put to sea.

On July 27th, Germany completed her requisitions and placed her covering troops in position in Alsace-Lorraine; Russia notified Austria that, if war broke out between Austria and Servia, Russia would not give way; the Vienna and Budapest bourses closed; a skirmish occurred on the Danube between Austrian and Servian forces; England stated to Germany that if Austria should invade Servia, she would prove she wished to crush a small state, thus raising a European question, and that a war would ensue in which all the Powers would take part; a state of war was declared in the Russian province of Kovno; the Belgian army was mobilized; shots were fired by a Cossack patrol on a German patrol at the Russian frontier; the 14th Corps of the French army discontinued manoeuvres, and returned to its garrison, and Germany refused Sir Edward Grey's proposal for a conference.

These political events, and others of minor importance, are referred to in the Record (pp. 173-181).

The European crisis was discussed at length in the American newspapers, and was the subject of great public interest in this country.

At the time of the shipment of the gold in question the European situation was serious, but the

prevailing opinion in this country was that the diplomats of the respective Powers would succeed in arriving at a satisfactory understanding.

Statement of Facts.

The North German Lloyd steamship "*Kronprinzessin Cecilie*" was built in the year 1907 at a cost of about $4,500,000. On July 27, 1914, she was lying in the port of New York and on that day received on board consignments of gold and silver bullion of the total value of more than $11,000,000 to be carried to Plymouth, England, and Cherbourg, France.

The Guaranty Trust Company of New York shipped 93 kegs of gold bullion of the value of $4,942,937.64 to be carried to Plymouth, and thence to be forwarded to London and there delivered in like good order and condition unto the order of the libelant in consideration of $9,268 prepaid freight (Stipulation, p. 164, fol. 653).

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the Trust Company the sum of $1,544.67, the proportion of the prepaid freight covering the inland transportation of said Trust Company's gold from Plymouth to London (Stipulation, p. 167, fols. 666-7).

The National City Bank of New York shipped 21 kegs of gold bullion of the value of $1,061,718.89 to be carried to Plymouth and thence to be forwarded to London and there delivered unto the London City & Midland Bank, Ltd., in consideration of $1,990.72 prepaid freight, and 40 kegs of gold bullion of the value of $2,104,254.34 to be carried to Cherbourg, France, and thence

to be forwarded to Paris and there delivered unto the Credit Lyonnais in consideration of $2,630.32 prepaid freight (Stipulation, pp. 311-12).

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the National City Bank of New York the sum of $331.79, the proportion of the prepaid freight covering the inland transportation of said Bank's gold from Plymouth to London, and the sum of $657.58, the proportion of the prepaid freight covering the inland transportation from Cherbourg to Paris (Stipulation, p. 314, fol. 1255).

Neither the Trust Company nor the Bank made any statement of the purpose for which its shipment was made, otherwise than as stated in the bill of lading, or of the disposition which it intended to make of its gold, and no notice of any special damages which might result from the failure of the steamship or of the claimant to perform its contract (Stipulation, p. 164, fol. 655; p. 312, fol. 1247).

The bills of lading were in the usual form, containing, among other stipulations, an exception against liability occasioned by "arrest and restraint of princes, rulers or people" (Bills of Lading, pp. 17, 129, 133), and there were other provisions or exceptions contained in them in favor of the shipowner, indicating that time was not regarded as of the essence of the contract.

The freight received by the claimant for these shipments was about one-eighth of one per cent. of their value.

The ship carried a full complement of officers and crew amounting in all to 645 men. Altogether

there were about 1892 persons on board comprising 354 Americans, 667 Germans, 406 Austrians, 3 Italians, 151 Russians, 7 French, 14 English, 1 Australian, 2 Belgians, 4 Spaniards, 2 Swiss, 3 Cubans, 8 Bulgars, 7 Serbs, 1 Roumanian, 1 Greek and 3 Hollanders, besides a large number of passengers of whose nationality there was no record at the time of the trial (pp. 302, 303).

These persons represented substantially all the nations which subsequently became involved in the war.

The *Cecilie* sailed early in the morning of July 28th and continued on her eastbound voyage until at about 10 P. M. on the night of July 31, 1914, when 1070 nautical miles from Plymouth, her first port of call, she received a wireless message from her directors at Bremen stating that war had broken out with England, France and Russia and advising that she put back to New York (Stipulation, pp. 164-165, fols. 656-660).

Captain Polack thereupon turned his ship and put back towards the United States. *The following day he received a wireless message from the German Imperial Marine Office forbidding him to touch at any port of England, France or Russia* (p. 259, fols. 1033, 1031).

When nearing New York, on account of supposed danger from British cruisers, Captain Polack directed his course to Bar Harbor, Maine, where the ship arrived safely on August 4th, and all the gold and silver bullion was returned to the parties entitled thereto.

The directors of the North German Lloyd, before they dispatched their wireless message, knew

of all the important political events which had transpired since the assassination of Archduke Ferdinand and his wife, and had received authoritative information from high governmental sources of the events immediately preceding active hostilities. Thus they had been informed of the proclamation of threatening danger of war for the German Empire and had received from the Imperial Admiralty Staff the general warning sent out to all ships of the German Mercantile Marine; they had been notified by Baron von Plettenberg, one of their number who had been sent to Berlin, that he had been informed by government officials that short time ultimata were to be sent at once to Russia and France and that an Imperial proclamation, declaring the existence of a state of war, had been perfected and would immediately be made public (fols. 1389-1405).

The Lloyd's nautical department had been constantly engaged in figuring the positions of their ships and their coal supplies and knew that a determination with respect to the *Cecilie* would have to be reached early in the afternoon of July 31st, for otherwise she would not have sufficient coal to return to the United States (fols. 1395, 1406). The correctness of their estimate is shown by the fact that when she finally reached Bar Harbor there remained in her bunkers only 450 tons, which was much less than a day's supply (fol. 997).

Before leaving New York Captain Polack, master of the *Cecilie*, had carefully read the American newspapers and had kept himself informed as to the progress of events (fol. 998). While on the voyage he received by wireless much additional

information indicating that the political situation was becoming more acute, and, when in conference with his chief officer, expressed grave anxiety as to the situation and a desire to obtain information from the Home Office (fols. 914-939, 1041). When, on the night of July 31st, he received the message from his directors, the instructions given to return to New York coincided exactly with his own judgment and this course seemed to him to be the best and only thing to do in the circumstances (fols. 1039-1040).

That the return was fully justified is conclusively proved by the fact that on August 1st Captain Polack received from the Imperial Marine Office at Berlin a wireless message forbidding him to touch at any English, French or Russian ports (fols. 1026, 1031-3).

Judge Hale, before whom the case was tried in the District Court, made a careful examination of the evidence and decided that he (the master) "acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity." So far as the claimant's directors were concerned the learned judge held that they "acted with a reasonable apprehension of imminent peril, when they sent the wireless message to their captain," and that "the master acted with due regard to the safety of all interests intrusted to him, and under a reasonable apprehension of imminent peril" (fols. 1575, 1602-4).

The learned judge arrived at this conclusion "without considering the terms of the bill of lading, for the reason that the master was justified in his action by the duty imposed upon him under

the maritime law" (fol. 1604). He accordingly dismissed the libels.

In referring to Captain Polack, Judge Hale said that he impressed him "as being a truthful man, and a faithful, trustworthy shipmaster. He showed a clear appreciation of the trust imposed in him" (fol. 1548).

Judge Dodge said that the master's testimony at the trial impressed him "as it did the District Court, with its apparent truthfulness" (p. 439).

Judge Putnam entertained the same views of the merits of the case as Judge Hale, in fact he regards the case as too clear to require argument or the citation of authorities, for he says (p. 465), "It is unnecessary to cite authorities on this topic, because the law is too well settled and the underlying principles are all too uniformly accepted, in the circumstances of this case, to the effect that it was not only the right but the duty of the master of this ship not to delay, and hazard running his vessel into a possible hostile port, but to use justifiable precautions and reasonable grounds for apprehension of capture, and to have due regard to the uncertainties of the ocean, and leave reasonable margin for the state of weather and for accidental detentions; and under the circumstances of this case the decision to turn back was justifiable whether it came from the master or owners."

Judges Dodd and Bingham, constituting the majority of the Circuit Court of Appeals, differed from Judges Putnam and Hale and decided that the return of the *Cecilie* was unjustified and the ship liable in damages to the libelants, basing their decision, not upon broad principles of mari-

time law, but upon narrow and technical reasoning to the effect that Captain Polack acted under orders from his directors; that therefore the return of the ship to the United States cannot be justified as a reasonable exercise of the master's discretion; and that notwithstanding the fact that a declaration of threatening danger of war had been proclaimed and that a proclamation of the existence of a state of war had been prefected, the statement in the message that war had broken out was not literally true. Judge Bingham goes so far as to say that "to permit the claimant to avail itself of the master's decision obtained under such circumstances, would be the equivalent of according to one the protection of a judgment which he had procured through fraud" (p. 451).

The majority of the court hold in effect that the owner on shore has no general discretion as has the master on the ship, and that war not having actually been declared when the ship was turned, there was no arrest or restraint within the meaning of the exception in the bills of lading, *and that there could be no arrest or restraint before the existence of an actual state of war* (pp. 444, 456).

POINTS.

I.

The decision of the Circuit Court of Appeals is in conflict with the Styria, 186 U. S., 1.

In the *Styria* case the facts were as follows:

The *Styria*, an Austrian steamship, sailing from

Trieste *via* Sicilian ports to New York, took on board at Port Empedocle, Sicily, a quantity of sulphur for New York. She reached Port Empedocle on April 21, 1898, and her master began at once to load on board the sulphur in question, and by April 24th it was all on board and bills of lading, excepting "restraints of princes and rulers, or people," had been signed, and the vessel cleared from the Custom House, and was ready to proceed on her voyage to Messina and Palermo for a cargo of fruit, and thence to New York. In the meantime, unknown to the master, war had broken out between the United States and Spain, and on April 22nd, the first act of war, the capture of a Spanish merchant steamship, the *Buena Ventura*, was committed. On April 25, the Queen Regent of Spain issued a decree announcing the existence of war, and declaring sulphur, among other things, to be contraband.

On April 23rd, the master of the Styria received a telegram from Burrill & Sons, her managing agents in London, directing him not to sail until further orders; and on April 25th, another telegram directing him, "to discharge whole cargo as quickly as possible," without assigning any reason for this order. The master had by this time learned that war existed, and that sulphur was contraband. In obedience to the instructions from the managing agents, as well as because he saw in the newspapers that sulphur was contraband, the master began to reland the sulphur at Port Empedocle on April 27th, and had it all unloaded and warehoused by May 7th. On April 30th and May 2nd the shippers of the sulphur protested against the unloading.

The exportation of sulphur is one of the principal industries of Sicily and immediately after the declaration of war, Sicilian merchants urged the Italian Government to request Spain to exempt it from the list of contraband. The representations of the Italian ambassador in Madrid, resulted in a declaration by the Spanish Government, that it would permit sulphur to pass free, and would advise its naval commanders to that effect. The negotiations between the Italian and Spanish Governments were published in the Italian newspapers and it was also reported that the negotiations would be, and later that they had been, conducted to a successful termination.

On May 5-6, the Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, which read in part as follows: "*I would also state that, in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. (Signed) The Minister, Cocco-Ortu.*"

These reports were read by the master of the *Styria*.

The sulphur was not wholly discharged until May 7th. In the meantime "a vessel which lay alongside the *Styria* at Port Empedocle, loading sulphur, sailed before she did, and arrived at New York in safety on May 19th. *Two other vessels laden with sulphur came safely from the Sicilian Port of Licata to the United States about the same time, and no ships were taken by Spain during the war*" (p. 7). The master, acting under the orders of the agents, which were in accordance with his own judgment, as he did not think

the newspaper reports sufficiently "authentic", sailed without the sulphur.

The District Court held that the discharge of the cargo was too hasty and precipitate and not justified by the facts of the case.

On appeal to the Circuit Court of Appeals, it was held that the sulphur was rightly discharged, but should have been reloaded before the *Styria* left Port Empedocle.

The case having been brought to this Court by a writ of certiorari, it was held that the master was justified in landing and storing the cargo, and that it was not made his duty by the facts brought to his notice to reship the sulphur on the *Styria* and further delay the voyage.

The Circuit Court of Appeals has unsuccessfully attempted to distinguish the present cases from the *Styria* in four important particulars:

(a) In the present cases the majority of the Circuit Court of Appeals refuse to justify the return of the *Cecilie* as an exercise of her master's discretion, upon the ground that, having received from his owners an order to put back, he was deprived of all discretion. In this connection Judge Dodge says (p. 437):

> "The owner of the ship had the burden of proving circumstances actually existing at the time, sufficient to justify such an exercise of discretion on the master's part, present to his mind when he turned back; and also an actual exercise of such discretion by him in view thereof. I have been unable to agree with the finding below that this burden was sustained."

If this statement be correct, the owner must prove three facts:

1st. That circumstances actually existed which would justify the master in turning back.

2nd. That the master had full knowledge of all these circumstances when he turned back, and

3rd. That in turning back there was an "actual exercise" of such discretion by him "in view thereof".

It would not be sufficient for the owners to prove that when the ship turned back there had been an actual declaration of war betwen Germany and England, France and Russia, nor would proof of the additional fact that the master was fully informed of such declaration be sufficient unless they could show that in turning the ship the master acted entirely upon his own judgment and discretion, without any order or suggestion from the owners, who were on shore and in a position to have the best possible information as to actual conditions.

Later the learned judge says "the owner's direction to turn the ship back appears from the evidence to have been a specific and unqualified order, leaving the master no choice but to obey. * * * By assuming to direct from Bremen, as it did, the course which the ship should take, her owner assumed, for itself and its ship, all such responsibility and lost all right to charge the master with any share thereof" (p. 438).

In this connection the majority of the Circuit Court of Appeals have ignored the fact that in the case of *The Styria*, and in the case of *Nobel's Explosives Co. v. Jenkins* (L. R. [1896] 2 Q. B.,

326), approved in *The Styria* case, the masters acted under orders received from their owners which were just as peremptory as the order received by Captain Polack.

In *The Styria*, Mr. Justice Shiras, writing the opinion of this Court, referred (p. 19) to a suggestion that had been made by the District Judge, and repeated in the argument for the libelants, "to the effect that the master was guided in his action in discharging the contraband cargo by a telegram from Burrill & Sons, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time". In disposing of this contention the learned justice says:

> "(This) does not appear to us to be supported by the testimony of the captain, which is the only evidence on the subject. Is is true that he did state that he acted under instructions of the agents, but he alos said, in reply to questions put on cross-examination as follows:
>
> 'Now, Captain, you say that you put this brimstone ashore on instructions of the managing owners? Answer: Yes, and also because I knew that the war was there, and I acted on the bill of lading clause. Question: You have testified, haven't you, that all this you did by orders? Answer: No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deemed it not safe to proceed with the cargo that was declared contraband of war.' "

Mr. Justice Shiras then proceeds as follows (p. 20):

"'Without transcribing all of the master's testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with the contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have already said, had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so. So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf.

In the case of *Nobel's Explosives Co. v. Jenkins,* just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners, if it were possible to get it before the emergency was over; and all that can be said is, that there was a concurrence of judgment between the ship agents and the master as to what was the proper course to pursue."

In the present cases there were certain facts which made Captain Polack's position one of peculiar responsibility.

The *Cecilie* was one of the most valuable vessels afloat, having cost approximately $4,500,000, and carried 1892 persons of practically every nation which subsequently became involved in the

war, principally Germans (pp. 302-303). A great number of these persons would be subject to arrest if war should break out while the ship was in Plymouth, Cherbourg or Bremerhaven.

The ship carried mixed cargo consigned to German consignees at Bremen, of which the total value was $139,335 (p. 11, fol. 41).

The sailing of the *Cecilie* with a large amount of gold bullion was contemporaneously published in the leading newspapers of America and Europe, and was given great notoriety throughout the world (p. 308, fol. 1233), and Captain Polack had reason to assume that enemies' vessels would keep a bright lookout for so rich a prize.

The situation required the exercise of greater caution than in the case of an ordinary merchant vessel.

Before sailing Captain Polack had kept in touch with the political situation and knew in a general way how events had been developing, and after leaving New York he received, from time to time, wireless messages informing him as to the progress of events.

These news items were published in the "Ocean Gazette," a newspaper printed on the *Cecilie* (Libelant's Ex. 3, pp. 232-4; Libelant's Ex. 2, pp. 229-31).

The news thus received indicated that the situation was becoming more and more acute.

On July 29th the Gazette published a wireless dispatch from London announcing the formal declaration of war by Austria against Servia and active hostilities between the two countries: the refusal of Germany and Austria to accept the proposal of Sir Edward Grey for a conference of

ambassadors of the powers in London; the issuance of orders for the German fleet to concentrate in home waters and an announcement that the British first and second battle squadrons were in readiness for service; a dispatch from Berlin to the effect that a Russian force had occupied positions near the frontier of Russian Poland and that a squadron of German cavalry had also advanced to the frontier; an announcement that Emperor Franz Josef had granted complete amnesty to all Austro-Hungarian subjects who had deserted from the army or who had emigrated to other lands to avoid military duty.

On July 31st, the Ocean Gazette published the following news items:

An ultimatum from Germany to Russia demanding an explanation for the latter's mobilization, the answer to be given within 24 hours; fighting between Austrian and Servian forces at several points; a report that the southern column of Austrians in Bosnia was watching the Montenegrin troops, and that in a severe battle in Bosnia the Austrians had defeated the Servians, with many killed on each side; and announcement that the gravity of the international situation was recognized in all European capitals; that Russia was proceeding with her mobilization of a large number of troops while the French defensive forces were taking extensive precautions; that business was practically suspended on the London Stock Exchange pending the serious war situation and that dealers refused to make prices; that the consols had reached a record low price of 69½, the lowest in a century, and that seven failures were reported; that the St. Petersburg, Vienna, Buda-

pest and Brussels Exchanges remained closed and that two failures had been announced on the Glasgow Exchange; a declaration by the Shimbum, a semi-official newspaper of Japan, that if England were attacked, Japan would give assistance to the British arms, and a dispatch from Washington to the effect that administration officials were awaiting additional developments in European politics, and that if nations other than Austria and Servia were drawn into the conflict, a proclamation of neutrality covering the entire situation would probably be determined upon by the State Department.

The news received during the eastbound voyage increased Captain Polack's anxiety. He discussed the matter with his chief officer on the night of July 30th and, as he expressed it, he was very anxious to "get news from home about the political situation and about this war" (fol. 1041). All the news he received indicated that the situation was rapidly becoming more critical so that when he received the message from his managing directors, whom he assumed to be well-informed the course which appealed to his best judgment as the best one to pursue was to turn back to the United States and not run into any danger; that seemed to him the best and only course (p. 260).

The wisdom of this course was fully confirmed when on the following day he received the wireless message from the Imperial Marine Office.

In the cases at bar the master's judgment was based upon (a) the information he obtained before sailing; (b) the information he obtained on the voyage indicating the increasing gravity of

the situation, and (c) the information acquired from his directors at Bremen, and later confirmed by that received from the German Imperial Marine Office.

All the facts pointed irresistibly to the conclusion that the return to the United States was the only safe course to pursue.

In the case of the *Styria* the master received a peremptory order from his owner's agents to leave the sulphur at Port Empedocle. While his earlier information was that sulphur had been declared contraband, he was later informed, through the publication of an official declaration from the Italian Minister of Agriculture, that the Spanish Government had agreed to let sulphur pass free. This later information he chose to ignore, not considering it sufficiently "authentic."

If Captain Polack had, in turning back, acted contrary to his own judgment, the question of justification might have arisen, but we confidently submit that in this respect the present cases are on all fours with the case of *The Styria*, and that in these cases, as in the *Styria* case, although the master received instructions from his owners, there was a concurrence of judgment between them as to what was the proper course to pursue.

(b) The majority of the Circuit Court of Appeals hold that the return of the *Cecilie* was due to an apprehension of a non-existent future restraint, but that to justify the return there must be "an actual and operative restraint, and that no merely expected and contingent restraint affords sufficient excuse" (Judge Dodge's Opinion, p. 442).

In so holding the majority of the court ignore the fact that in the *Styria* case there was no actual restraint or danger, either existing or *in futuro*, because the Spanish Government had agreed to permit sulphur to pass free, and during the Spanish-American war this permission was never rescinded.

(c) The majority of the Circuit Court of Appeals attempt to distinguish the present cases from the case of *The Styria* by reason of the fact that in the *Styria* case the bill of lading contained a stipulation that the ports of delivery should be safe (Judge Dodge's Opinion, p. 432), entirely ignoring the fact that in the *Styria* case this stipulation was immaterial and inoperative for the reason that the port of New York was the port of destination and it was not even suggested that this port was at any time unsafe. This court's decision in the *Styria* case did not in any way depend upon this stipulation in the bill of lading, but was upon broader principles of maritime law which should determine the present cases as well.

This is also true of the English cases. (*Pole v. Cetovich* (1860), 9 Com. Bench, N. S., 430; *The Teutonia* (1872), L. R., 4 Priv. Council, 171; *The San Roman* (1873), L. R., 5 Priv. Council, 301; *Nobel's Explosives Co. v. Jenkins* (1896), 2 Q. B., 326.)

(d) The majority of the Circuit Court of Appeals holds in effect that to justify the return of the *Cecilie* an actual state of war must have existed at the time when the deviation occurred, and that no authority exists in law for any other view.

His Honor, Judge Dodge, says (p. 444):

> "But no case is found in which, there being no actual state of war, abandonment of a contract like this has been excused under the exception here relied on, because of mere apprehension that actual war might exist before delivery according to the contract could be made."

This we submit is an erroneous statement of the law which if permitted to stand will cause great confusion.

In *The Teutonia*, L. R., 4 P. C., 171, approved by this court in the *Styria*, the master deviated from the port of Dunkirk, his port of destination, upon information that war had been declared between Prussia and France, *the fact being, however, that war had not been declared and was not in fact declared until three days after such deviation.*

II.

In the circumstances disclosed by the record, the North German Lloyd Directors were not only justified in sending out their wireless message, but it was their duty to do so. The performance of this duty cannot create a liability.

The causes which impelled the directors to dispatch the message to Captain Polack are fully set forth by them in a statement which is stipulated into the record (pp. 348-352). As this statement is of vital importance, as showing justifi-

cation for the recall of the *Cecilie*, we venture to reprint it in full.

> "Up to Wednesday, July 29th, the interpretation of the political situation, which, of course, was followed by us with the greatest attention, from the time of the ultimatum sent by Austria to Servia, and the conflict of interests resulting therefrom, between the powers interested directly or by alliance was essentially a quiet and optimistic one, on the part of the Board of Directors of the North German Lloyd, as up to that time a restricting of the conflict to the powers immediately interested therein, namely, Austria and Servia, was counted upon, and we did not believe as yet in the active participation of Russia and France on the one side, and Germany on the other.
>
> Accordingly, the Board of Directors did not as yet see any reason for any immediate decision in regard to the further movements of our ships.
>
> In this interpretation of the Board of Directors there occurred a decisive change on the evening of the day mentioned, July 29th, owing to the fact that Captain Bartling, the manager of our nautical department, returning from a trip to Berlin on matters concerning his department, brought with him information in regard to a very serious interpretation of the political situation of various governmental officers; according to which it was already being seriously considered there that the remaining European great powers could be drawn in the pending conflict, and that there could be a general European war.
>
> After the return of Captain Bartling, the members of the board of directors at Bremen held a meeting during the night to discuss the measures to be undertaken. They deter-

mined to delegate a member of the board of directors to proceed to Berlin in order that he might make inquiry of government officers and obtain information in regard to the development of events. Baron von Plettenberg was chosen to proceed to Berlin and he started that night.

Special attention was paid by the Board of Directors to the Steamer *Kronprinzessin Cecilie*, after her departure from New York on Tuesday, July 28th, as this ship, owing to her route, had to appear endangered, in case of the breaking out of war, and also required our special attention, owing to the high value of the ship and the cargo.

Upon instructions of the Board of Directors, the Nautical Department figured out exactly what was the latest time that the vessel would have, to receive an order in regard to the continuation or interruption of her journey, and we reached the conclusion that according to the supply of coal on hand, and the duration of the trip in question, the Board of Directors would have to come to a decision in regard to this by latest during the early hours of the afternoon of Friday, July 31st.

In this connection, it was also taken into consideration that owing to the great congestion of the cable and wireless connections, a longer period of transmission of our telegram would have to be figured with. A period of time which actually from the departure of our telegram, July 31st, 2:45 p. m. until its receipt on board of the *Cecilie*, July 31st, 10:09 P. M. true time of place, even exceeded our expectations and actually resulted in the face that the *Cecilie could no longer return* to New York in compliance with our order, but had to select the shorter route to Bar Harbor.

The mission of Baron von Plettenberg,

who arrived in Berlin on July 30th, in the morning, did not bear any positive results on this first day, as he could not obtain any decisive information and indications from the government offices visited by him, in regard to the probable further development of the political situation.

Accordingly our interpretation of the political situation was still a predominantly confident and hopeful one on this day, July 30th, and we allowed our steamer *Main* to leave Bremerhaven for Antwerp as scheduled.

However, on the evening of this day, July 30th, there was issued a general warning to the German Merchant Marine Service through the Admiralty Staff. This warning, which became known to us the same evening, constituted the first official sign for us of the very serious interpretation of the political situation by the German government, and caused us, beginning with this period of time to begin sending the first telegraphic instructions for our vessels in regard to the further procedure of their trips.

On Friday, July 31st, shortly after 2 o'clock in the afternoon, we received from Baron von Plettenberg, the telegraphic information that he had learned from an authoritative source that the declaration of the state of war, 'Erklarung des Kriegszustandes fur das deutsche Reich wegen drohender Kriegsgefahr,' had been perfected, and would shortly be made public.

This 'declaration of the state of war for the German Empire, owing to the "threatening danger of war" ' was then, soon afterwards, at 4:16 in the afternoon, brought to our knowledge by a telegram of the Imperial Marine Office, and the respective Imperial decree was publicly proclaimed on the same afternoon at about 5 o'clock, in Bremen also.

On the basis of this telephonic advice

from Baron von Plettenberg, the telegram was sent to Captain Polack immediately at 2:45, upon the resolution of the members of the Board of Directors assembled at Bremerhaven, recalling the *Cecilie* to New York.

The decree of the state of war for the German Empire, as quoted above, communicated to us by Baron von Plettenberg, offered to the members of the Board of Directors who participated in this resolution, the immediate reason for the recall of the *Cecilie*.

Compared with this decree of a state of war, all other political advices and facts which he had at the time, as expressed in the newspaper material are only of secondary and minor importance of a commentary and explanation of this governmental decree, from which could be seen the causes and gradual developments of the conflict, and the enemies to be expected in case of the breaking out of the war, which however, in itself, and without the supplementary act of the government in declaring the state of war would not, as yet, have caused us to take immediate action in regard to our vessels.

Therefore this decree of a state of war alone can be designated as the decisive fact inducing us to recall the *Cecilie*. * * *

Consequently the considerations which induced us to recall the vessel were to the effect that according to this declaration of the state of war, Kriegszustandes, the outbreak of the war could be considered as most probable."

The majority of the Circuit Court of Appeals hold that these facts did not justify the directors in recalling the *Cecilie*. Judge Bingham characterizes the information contained in the telegram as false and says, that "to permit the claimant to avail itself of the master's decision obtained

under such circumstances would be the equivalent of according to one the protection of a judgment which he had procured through fraud" (p. 451).

We submit that this characterization is unjust to the claimant and unwarranted by the facts.

The proclamation of threatening danger of war, followed by the Government warning to German shipowners, and the second proclamation of the existence of a state of war, indicated in precise terms the danger to be apprehended, and although the declaration of a state of war did not in itself amount to a formal declaration of war against any particular power, it was fully understood by the North German Lloyd directors what governments were involved. In the circumstances, the proclamation of the existence of a state of war, carrying with it a declaration of martial law, was equivalent to all intents and purposes to the outbreak of war, certainly so far as the future guidance of the North German Lloyd vessels was concerned.

In phrasing their wireless message as they did, there was no thought in the minds of the directors of deceiving any one, but they were concentrated upon conveying the most precise information to their captain of the seriousness of the situation as they viewed it.

The directors' reasons for saying that war had broken out are expressed, in their own language, in their further statement which has been stipulated into the record (pp. 355-356):

> "The reason why we stated in our telegram to the *Cecilie* that the war had broken out, whereas, up to that time, as a matter of

fact only the proclamation of a state of war, owing to the threatening danger of war had been issued, are the following:

First of all, according to the proclamation of the state of war, of which Baron von Plettenberg advised us, the breaking out of this threatened war within the next 24 hours could be expected with the greatest probability.

Secondly, we stated ourselves, when sending off the telegram that every other information in regard to the political situation, every statement that was not absolutely clear and comprehensive in regard thereto, was inadvisable, and could only lead to misunderstanding and unsafe resolutions.

The sole information that the state of war had been proclaimed would probably have been incomprehensible to the Captain, who, of course, would not have been familiar with the regulations of political law.

Only the information that war had already broken out could show him the political situation in the same degree of distinctness and clearness with which we viewed it here, and told him to observe in the further guidance of the vessel the deportment and care which we considered absolutely necessary here, just as if the war had actually broken out here.

Furthermore we had to count on quite a long period of transmission for our telegrams, during which time, therefore a further aggravation of the situation in the direction of war was to be expected, and we also had to take into consideration that if the breaking out of war had actually occurred, it would most probably have been impossible for us to advise the vessel of this at that time on account of the isolation or interruption of the telegraphic connections.

The wording of our telegram, therefore, occurred purposely in the form that we reported the war as already having broken out.

and has nothing to do with the wording of our telegram code."

We submit that in turning the ship Captain Polack exercised a wise discretion for the benefit of all interests committed to his care, basing his judgment upon information amply sufficient to justify his decision.

It is manifest that upon the facts presented to him there was no other course to take. If war had broken out with France, Russia and England, to go back meant certain capture. If the master had obtained the facts stated in the directors' message from any other credible source, there can be no question but that his action in turning back would have been justified. It follows then that if the action of the master be not justified it is because of the owner's message. In other words, the claim is made, and is supported particularly by the opinion of Judge Bingham, that if the statements in the owner's message were not true, the claimant cannot set up the exercise of the master's judgment as a defense. Judge Bingham says that to permit such a defense would be equivalent to permitting a person to take advantage of his own fraud.

The message was in no respect fraudulent. It was a private message from owner to master. Third persons could not have been, and were not, misled.

There is nothing in the record that suggests that the owner was attempting to commit a fraud, or to obtain any unfair advantage, either of the libelants or of any one else.

If the court is of the opinion that the effect of the wireless message was to substi-

tute the authority of the directors for that of the master, we confidently submit that the facts within the knowledge of the directors not only justified them in recalling the *Cecilie*, but that a moral and legal obligation rested upon them to do so. A proclamation of threatening danger of war had been issued; a general warning had been sent out to German vessels by the Imperial Marine Office and they had received information from an authoritative source that a proclamation of the existence of a state of war, carrying with it a declaration of martial law, had been perfected and would immediately be published, and that short time ultimata would at once be sent to Russia and France. They knew that if they waited later than the afternoon of July 31st they would be unable to recall the *Cecilie* to the United States on account of coal shortage; they knew that she could not in ordinary course reach Plymouth, her first port of call, until the morning of August 3rd; that she could not cross the Channel and reach Cherbourg until some hours later, and that she could under no circumstances reach her home port of Bremerhaven before August 4, and that to reach her home port it would be necessary for her to pass through the full length of the English Channel and the Straits of Dover, encountering war vessels which were sure to be on the lookout for her.

The directors could not embody all this information in a wireless message, and if they had stated merely that a state of war had been proclaimed, this would have been incomprehensible to the captain who was not familiar with the regulations of political law. They, therefore, framed the mes-

sage in such a form that it would express to the captain the actual dangers to be apprehended, at the time of the arrival of the message, with the same degree of clearness as the directors viewed the situation at Bremen.

The libelants have taken the position that the delivery of their gold at Plymouth and Cherbourg is the only question which concerns the Court, entirely ignoring the master's and owners' duty to the passengers, crew and German cargo owners.

In fact counsel for the libelants admitted in open court that it was extremely improbable that the *Cecilie* could have arrived safely at Bremerhaven, which admission is referred to by the District Judge in his opinion (fol. 1600). Counsel asserted that this did not relieve the ship of her obligation to deliver their gold at the ports of destination.

Neither the master nor directors were under any obligation to sacrifice the ship, and the duty rested upon the directors, as well as on the master, to adopt reasonable precautions for the protection of the German cargo which would be subject to seizure in an English or French port, and the passengers of various nationalities, many of whom would be arrested either in the ports of call or in the port of ultimate destination.

Wireless telegraphy furnished a method of communication with the ship, but the directors knew that as the crisis culminated, this method was becoming more and more uncertain, and would finally be entirely cut off, and the duty rested upon them to communicate with Captain Polack while they still had the opportunity. The

dispatch of the wireless message was not the hysterical act of a panic-stricken director, but was the wise precaution of a well-informed board taken for the benefit of all concerned after painstaking inquiry and careful consideration of all the facts.

The test as to whether the owners are to be barred by the form of their message from setting up the master's judgment in concurrence with their own as a defense must be this: If the directors could have included in their message a statement of all the political events which had occurred down to the time of its dispatch, would a prudent master have been justified in turning back? The owners cannot be estopped by what they said if the whole and exact truth would have produced the same result. And we submit that had these owners been able to incorporate in their wireless message all the facts known to them, showing the critical state of affairs and the actual existence of a "state of war", the only possible course for Capt. Polack to have taken would have been to turn back exactly as he did.

Wireless telegraphy does not deprive a ship master of his discretion, but the obligation rests upon the owner on land, in case he acquires information of danger threatening the ship, passengers or cargo, to communicate with his master and give him appropriate instructions for the common safety. To hold that by so doing the owner is incurring liability, would be contrary to public policy, for it would discourage owners from utilizing an obvious means of safety.

If the officers and directors of a corporation which owns a ship owe a duty to passengers, crew

and cargo, as well as to the ship itself, to use modern means of communication to inform the master of the ship of impending dangers which come to their knowledge, such duty must carry with it a corresponding right. If the duty be to protect the different interests from threatening danger, then, when the duty is performed, liability cannot grow out of the performance of it. Such officers and directors in these days of wireless telegraphy may, on account of their situation and their ability to command such means of communication, owe the duty of taking even peremptory action for the protection of all interests. But if they do owe such duty, and exercise their best judgment, they are entitled to the benefit of it. Every consideration which makes the judgment of the master controlling and effective, as relating to all interests, must operate to give the same effect to the judgment of the owner, when he is required to act for the protection of all.

III.

To exonerate the ship it was not essential that both ship and cargo be exposed to a common peril.

The majority of the Circuit Court of Appeals hold that the abandonment of the voyage cannot be justified, because the precaution was obviously for the sake of the vessel, and not the cargo.

The headnote of the reported case succinctly states the substance of the court's decision on this

point (238 Fed. Rep., 699). The headnote reads as follows (subdiv. 3):

> "In such case, the act of the owners in abandoning the voyage cannot be justified on the ground that it is the carrier's duty to take reasonable care of the goods entrusted to him, for the precautions were obviously for the sake of the vessel, and not the cargo, and were intended to place the vessel at a point of safety, should hostilities commence."

We submit that this statement is unsound in law and misleading in fact.

The statement is unsound in law because, to justify a deviation, it was not essential that both ship and cargo should be exposed to a common peril, and the master was not deprived of the right and duty of taking reasonable precautions for the preservation of his ship by reason of the fact that the gold bullion was American property, and therefore exempt from seizure.

The statement is misleading in fact because it assumes that all the cargo on the *Cecilie* was American property, whereas nearly $140,000 worth of mixed cargo belonged to German consignees at Bremen, and there were about 1892 persons on board, including 667 Germans and 406 Austrians, who would have been subject to imprisonment or detention in England or France.

The German cargo owners and the German and Austrian passengers and members of the crew were entitled to just as much consideration as were the Guaranty Trust Company and National City Bank.

In *The Teutonia* (1872) L. R., 4 P. C., 171, the court says (pp. 179-180):

"It was argued, however, on the part of the appellants, that, to justify this course, both ship and cargo must be exposed to a common peril, whilst in the present case the cargo, being the property of a neutral owner, would have been in no danger from being carried into a French port, and it was argued that though a master might be justified in deviating from the direct course of the voyage for the purpose of avoiding a danger to which ship and cargo were exposed, although it might afterward turn out that the information upon which the master acted was incorrect, yet that if the reported danger was a danger to the ship alone, the master would commit a breach of contract by deviating from the direct course of the voyage unless the danger actually existed, and the master could allege that he was prevented by one of the perils excepted in the bill of lading from pursuing his voyage in the direct course. It appears to their Lordships, however, that there is no sound ground for this distinction; if the cargo had been a Prussian cargo it would have been exposed to the same danger as the ship from entering the port at Dunkirk, and it appears to their Lordships that when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship."

That case was followed in *The San Roman* (1873), L. R., 5 P. C., 301, where the Court says (p. 307):

"Their Lordships agree with what was said before in the judgment in the case of *The Teutonia* (L. R., 4 P. C., 171)—that the owner of an English cargo on board a foreign ship cannot expect that the foreign master of the foreign ship will take greater precautions with respect to his goods, or will run greater risk in their defence, than he would with respect to goods of his own nation."

IV.

The uniform course adopted by all German shipowners in issuing warnings to their ships on July 30th and 31st, 1914, is in itself a clear indication that the interruption of the Cecilie's voyage was fully justified.

The record shows that on July 30th and 31st, 1914, 23 ships of the North German Lloyd and the ships of the Hamburg-American Line, Hansa Line and Standard Oil Company of New Jersey (which were under the German flag), upon receipt of advices from their respective owners, either returned to their ports of departure or sought, or remained in, neutral ports; that no German steamer left Hamburg or Bremerhaven for any foreign port after August 1, 1914, and that the last English bound steamers of the Argo Company which left Bremerhaven on July 30th for London and Hull, upon instructions from their company returned to Bremerhaven August 1st, without having discharged (Stipulations, p. 352, fol. 1408; p. 354; p. 357, fol. 1426).

The uniformity of the action taken by all German ships would seem to indicate sufficient ground for apprehension of danger, but Judge Dodge in his opinion (pp. 446-7) says that the owner's evident object was "not to avoid actual immediate danger of capture or detention then threatening these ships, but to keep them all as far removed as possible from any and all such regions of possible future danger."

But in this connection the thought is suggested that if Judge Dodge's conclusion be correct, the German steamship companies would have preferred to gather their ships in their home ports rather than to leave them scattered throughout the world.

V.

To hold that the adoption of modern methods of communication, involving increased safety to shipping, enlarges the liability of shipowners, would be unreasonable and contrary to public policy.

The majority of the Circuit Court of Appeals apparently consider that the adoption of modern methods of communication between owners and masters has deprived the latter of their discretion, and that while a loss through a peril excepted in a bill of lading will not render a ship liable to the cargo owner, a loss incurred in the avoidance of an excepted peril will, at the present

time, fix a liability upon the ship, if information of the peril and the proper way to avoid it has been received by the master from the owner on shore.

The introduction of wireless telegraphy has greatly increased the safety of shippers, but if this decision be permitted to stand, the adoption of precautions by a master for the safety of his ship and the cargo, based upon information received from the ship owner, would involve the latter in a liability from which he would be free if the same precautions were adopted upon information received from a different source.

VI.

The order received by wireless from the Imperial Marine Office may, in itself, be considered a restraint. At least, it shows that in the opinion of the German Government, English, French and Russian Ports would not be safe for German vessels on and after August 1, 1914, and, therefore, constitutes authoritative and conclusive proof of the wisdom of Captain Polack's course.

The record shows that on July 30, 1914, the German Admiralty Staff issued a general warning to the German Merchant Marine Service, and that on August 1, 1914, the Imperial Marine Office sent out a wireless message in the Government Code to all ships of the German Society for Wireless Telegraphy, which read: "Threatening danger

of war. Do not touch at any port England, France, Russia" (Record, p. 259, fol. 1033).

This message, which was received by Captain Polack of the *Cecilie* on August 1st, raises the important question as to whether the order in itself does not constitute a "restraint," having been given by a branch of the German Government to a German ship after the proclamation of a state of war, which was in effect a declaration of martial law for all Germany.

Aside from its mandatory character the message was of the greatest importance as indicating that the situation was so grave that in the opinion of the German Government no German ship should touch at any of the ports mentioned; and yet the majority of the Circuit Court of Appeals have not even mentioned this message in their long and elaborate opinions, and in the face of the declaration of the German Government have decided that British and French ports were safe on August 1st and that they continued to be safe as late as August 3rd, and have held in effect that the owners and master of the *Cecilie* should have set up their own judgment against that of their Government.

VII.

The majority of the Circuit Court of Appeals have confused principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading.

The majority of the Circuit Court of Appeals have in effect held that because, in their opinion,

the circumstances of the present case would not justify an abandonment for a total loss, if the ship or cargo were insured under a policy covering losses through arrest or restraint, it necessarily follows that there was not such an arrest or restraint as to bring the cases within the exception in the bill of lading.

His Honor Judge Dodge says (p. 441):

> "The phrase here in question (arrest and restraint of princes etc), or some substantial equivalent thereof, has long been familiar in charter-parties, bills of lading, and policies of marine insurance. When 'arrest and restraint,' etc., is a risk assumed by a marine policy, there must be proof, in order to justify abandonment to the insurer and maintain thereupon a claim for constructive total loss, that arrest or restraint etc., was the proximate cause of the abandonment and loss. The peril must operate upon the subject of insurance directly, not circuitously. If there has not in fact been actual arrest or restraint, etc., a loss because of apprehension thereof is not within the policy, unless the apprehension is shown to have been warranted by actual and immediate danger, apparently inevitable and morally certain. This may be regarded as settled by the decisions both in England and the United States; as is hardly disputed on the owner's behalf. Its contention is that a different rule of construction applies in cases arising upon bills of lading, and, in substance, that in such cases apprehension of capture or detention by a hostile power will excuse non-delivery under the exception here relied on, even though no such actual and immediate danger thereof existed, provided that the apprehension was on the whole reasonable."

After referring to *The Styria, Nobel's Explosives Co. v. Jenkins, The Teutonia* and *The Express*, the learned judge says:

> "No sufficient warrant is found in them for the claim that the recognized construction in insurance cases is inapplicable to the exception relied on in the present case."

If this statement be correct it would necessarily follow that nothing would excuse an interruption of the voyage prior to the time of a formal declaration of war, nothwithstanding the fact that the master or owner might have had authentic information that war would actually be declared during the presence of the *Cecilie* in one of her ports of call.

The fallacy of the court's decision, in this particular, results from the failure to appreciate that wholly dissimilar considerations enter into the determination of cases arising under policies of marine insurance and cases arising under bills of lading.

Policies of insurance are contracts of indemnity and in order to justify a recovery the insured must prove, first, that there has been an actual loss of the thing insured, and second, that the proximate cause of the loss is specifically covered by the policy.

To warrant a recovery under a policy of insurance covering arrest and restraint of princes, etc., it is not sufficient to show that the subject of insurance was *in danger* of loss, or that a loss was actually sustained through *fear* of a peril insured against, or in attempting to avoid such peril.

In England a technical and strict rule of inter-

pretation has been applied to losses of this character, and it has been held that even where delivery of a cargo at the port of destination has been prevented by an effectual blockade, and the master, in order to avoid the risk of certain capture put into another port or returned to the port of departure, the loss was one due to the *fear of capture*, and not to one resulting from the peril insured against.

Through all these insurance cases runs the same principle, viz., that to justify an abandonment and claim for a constructive total loss, the peril insured against must have operated *directly* upon the subject of insurance. While the Supreme Court of the United States and the Courts of New York and Pennsylvania have slightly modified the application of the English rule, they still adhere to the principle that the insured peril must operate directly, and not circuitously, upon the subject of insurance. The distinction is not one of principle, but in the application of the principle.

In *Olivera v. Union Ins. Co.* (3 Wheat., 183), an action was brought on a policy in favor of Spanish subjects on a cargo from Baltimore to Havana. The vessel having sailed and being near the mouth of the Chesapeake, February, 1813, the master descried four British frigates, officers from which boarded his vessel and indorsed upon the papers that the Bay of Chesapeake was under blockade, and ordered him to return, and not again to attempt to go out. The blockade was not known in Baltimore when the vessel sailed. The voyage was thereupon given up, and the cargo abandoned to the underwriters. This loss was held to be covered.

Marshall, C. J., delivering the opinion of the court remarked that an embargo was admitted to be a peril within the policy and added, "The application of force is not more direct on the vessel stopped in port by an embargo, than on the vessel stopped in port by a blockading squadron."

In commenting on this decision Mr. Phillips in his work on insurance says, "A distinction is made by the court in this and also a subsequent case, between occlusion in a port, bay, or river, and an exclusion from it; the former being held to be an arrest, restraint and detention within the policy: the latter, not so." *Phillips on Insurance*, Vol. 1, Sec. 1114.

In all these insurance decisions we find an apprehension in the mind of the court, that, to allow a claim for a constructive total loss by arrest or restraint where the thing insured was not actually lost by the *direct* operation of one of these perils, would afford to the insured an inducement to create imaginary dangers whenever the cargo is not likely to reach the port of destination in a sound state, or where the owner has reason to believe that his venture, if carried out, will be unprofitable.

This is well expressed by Lord Alvanley, Ch. J., in *Hadkinson v. Robinson* (3 Bos. & P. 388):

> "*If we were to decide that the sale at Port Mahon was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and by giving notice of abandonment, to throw*

a loss upon the underwriters to which they are not liable by the terms of the policy."

There is also the further consideration that inability to complete the voyage does not necessarily result in the total destruction of the thing insured. This is aptly expressed by the Lord Chief Justice in the case last cited (392):

> "But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, *such circumstances do not amount to a peril operating to the total destruction of the thing insured.*"

Very different considerations enter into the determination of cases arising under bills of lading.

> "Bills of lading contain an undertaking by the shipowner or carrier to deliver safely the goods set forth in them, unless prevented by certain perils known as 'excepted perils' or exceptions, provided that such perils and their consequences could not have been avoided by reasonable care and diligence on the part of the shipowner or carrier and his servants."
>
> *Scrutton on Charter-parties and Bills of Lading*, 7th Ed., p. 195.

A bill of lading constitutes the contract between the shipper and carrier, and where the latter undertakes to exercise reasonable care to prevent a loss from an excepted peril, there is a corresponding assent by the former that the carrier may adopt reasonable precautions to avoid such peril.

It would be an absurdity to hold that the performance of a duty creates a liability for damages.

In the case of a policy of insurance, if an insured peril be the proximate cause of the loss, it is immaterial that some other cause may have contributed to the loss, as for example, the negligence of the insured's servants.

In the case of a bill of lading, even though the excepted peril be the proximate cause of the loss, this will not protect the carrier if the negligence of his servants be a contributing cause, nor if after a loss without such contributory negligence, they fail to take reasonable care to minimize the damage. In the latter case the carrier will be responsible for the increased damage although not liable for the original damage.

Notara v. Henderson, L. R. 7 Q. B., 225.

While the maxim "*causa proxima, non remota, spectatur,*" has been held to apply to policies of insurance, it does not apply to bills of lading.

So if "restraint of princes" be covered by a marine policy and excepted by a bill of lading, in the former case, to render the underwriter liable, the restraint must "operate directly" upon the subject of insurance, and a loss incurred in the avoidance of the restraint is not collectible.

As was said by Bailhache, J., in *Becker v. London Assurance Corp.* (1915) 3 K. B., 410, "*It is clear that the avoidance of a peril* • • • *is not the same as loss by the peril itself.*"

In the case of a bill of lading, however, it being the duty of the carrier not to expose the shipper's goods to a restraint, he incurs no liability by performing this duty, even if the precautions adopted involve a deviation from his course.

The reason for this is obvious, for although, irrespective of the provision of a bill of lading, a shipowner is absolved from liability for losses due to the act of God or the public enemy, yet the obligation always rests upon him to use reasonable care, and if, through his negligence or that of his servants, the goods are exposed to loss from one of these causes, he will be liable. But as the law places upon the shipowner a *duty* to use reasonable care to avoid loss by the act of God or the public enemy, there must be a corresponding *right* on his part to adopt reasonable precautions to that end.

But discussion of this subject is of academic interest merely, for the courts of Great Britain and this country have uniformly refused to apply the insurance rule of construction to cases arising under bills of lading, notwithstanding the fact that in nearly all of the latter cases the libelants have insisted upon the analogy of the insurance decisions.

The true rule is as follows: *A reasonable apprehension of capture or other imminent peril justifies a master in deviating from his direct course and taking such steps as a prudent man would take for the purpose of avoiding danger, and in so doing he is entitled to consider the safety of his ship as well as the cargo, and the safety of the belligerent as well as of the neutral cargo.*

In *Nobel's Explosives Co. v. Jenkins* (1896) 2 Q. B. Div., 326, although there was a probability of capture, if the ship in question continued on to Yokohama, her port of destination, that probability did not in any sense amount to a "practical certainty," nor had an arrest or restraint of princes, etc., commenced to operate when the mas-

ter put into Hong Kong and discharged his contraband cargo. It was for fear, that if he continued on his voyage, the contraband cargo would be subjected to the excepted peril, that he discharged it at the port of Hong Kong.

And yet, had the contraband cargo been insured under a policy covering arrest and restraint, the probability of capture would not have justified an abandonment to the underwriters at Hong Kong; for fear of an arrest is not the same as an arrest, and the peril insured against had not commenced to operate directly upon the subject of insurance.

In the case cited, Mathew, J., said (p. 331):

> "It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith* * * * and *Rodoconachi v. Elliott* * * * I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception."

Later the learned judge said:

> "But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here,

if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated. In the words of Willes, J., in *Notara v. Henderson*, * * * 'a fair allowance ought to be made for the difficulties in which the master may be involved. * * * The place, the season—the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience must be taken into account. I am of the opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

In *Pole v. Cetorich* (1860) 9 C. B. [N. S.] 430, the plaintiffs' counsel made precisely the same contention as is made by the libelants in the present case. They argued that the defendant's agreement was absolute and that the mere apprehension of capture was no justification for its nonperformance. Byles, J., interrupted the argument by saying (p. 436), "You say the defendant was bound by his contract: *Paradine v. Jane*, Aleyn, 26. The question is, whether the defendant was not bound to take all reasonable precautions to render the risk as little as possible."

The same judge says in his opinion (p. 437):

> "Suppose at the time the captain received orders to proceed to Copenhagen a violent storm arose, would he not be justified in delaying his departure until the storm abated? Or, suppose a French fleet were outside the harbour, and it was morally certain that the vessel would be captured if she ventured out, the plaintiffs' counsel were constrained to contend that it would be the defendant's duty to go out and deliver himself and his ship and cargo to the enemy."

This case was cited with approval by the Privy Council in *The Teutonia* (1872), L. R. 4 P. C., 171, 179, where the Court says: "It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding danger. And their Lordships agree, if authority was wanting, that the case of *Pole v. Cetorich* (9 C. B. [N. S.] 43), is an authority in point." In *The San Roman* (1873) L. R. 5 P. C., 301, 306, the expression used by the Court is "an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience."

If the case of *Pole v. Cetorich* had arisen under a policy of insurance, it could not for a moment be contended that there had been a constructive total loss and no abandonment would have been justified, for the master refused to

leave Falmouth because he apprehended danger from French cruisers if he proceeded to Copenhagen; but the danger from French cruisers never operated directly upon the ship or cargo, and the proximate cause of the plaintiffs' damage was not an arrest or restraint, but the refusal of the master to proceed on his voyage.

In all the cases we have cited the master was held justified in adopting *reasonable precautions* to avoid the operation of the excepted peril, even though such precautions involved a deviation from his course or an abandonment of the voyage. And yet, in not one of them, if the question had arisen under a marine policy covering losses incurred through arrest and restraint, would it have been held that there was a constructive total loss or that an abandonment to the underwriters would be justified.

In the cases at bar, the fact that the rate of freight charged was only about one-eighth of one per cent., in itself, clearly indicates that the carrier did not intend to assume any such liability as that contended for by the Trust Company and Bank.

The statement of Messrs. Convers & Kirlin, counsel for the claimant in the case of *The Styria,* which will be found at page 44 of their Supreme Court brief in that case, is peculiarly applicable to the present cases. The learned counsel say:

> "If the master was justified in believing that there was reasonable probability that *The Styria* would be stopped and searched by the war vessels of Spain if she attempted to carry the sulphur to New York, then, as in *Nobel's Explosives* [sic] *v. Jenkins* (*supra*), there was a restraint of princes and rulers

and the ship was justified in refusing to carry the sulphur.

Sir Robert Phillimore stated the rule in *The San Roman*, L. R., 3 Adm. & Ecc., 593, as follows: 'According to both (the laws of England and Germany) an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, would justify delay.' "

And again, at page 45 of their *Styria* brief, the learned counsel say:

"If the carrier has reasonable ground for believing that his voyage will be attended with danger to the cargo, whether by reason of restraint of princes or otherwise, it is clearly his duty to exercise due care to avoid loss. For breach of this duty he will be held liable."

And again, at page 47:

"But in all cases the question was whether the steps taken were reasonable under the circumstances."

And at page 65:

"After the end of war, and in the peaceful security of its chambers, a court may look back on the events of the time and find that they were frought with less danger than was then apparent. But the master's situation was different. He had actual present responsibilities to discharge, and he had to act in the way which he regarded as the best for all the interests that were in any way entrusted to his charge."

VIII.

The libellants are not entitled to a refund of the prepaid freight.

The suits were brought to recover damages for alleged breach of contract and no claim was made in the libels for a refund of the prepaid freight.

Clause 12 of the bills of lading provides as follows:

> "Also, that the freight is payable on the actual value before shipment. Freight prepaid will not be returned, goods lost or not lost."

In this country and in all foreign jurisdictions the law is settled that if there is an express stipulation in the bill of lading that the prepaid freight shall be retained, irrespective of the uncertainties of the voyage, the shipper cannot recover it back, in the absence of negligence on the part of the carrier.

In *Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co., Ltd.* (1904), 130 Fed. Rep., 860 (certiorari denied 195 U. S., 629), it was held by the Circuit Court of Appeals, Ninth Circuit, that a provision in a bill of lading that the freight shall be "considered as earned, steamer or goods lost or not lost at any stage of the entire transit" is valid and enforceable.

Judge Hawley, writing the opinion, says (p. 863):

> "The contract as made between the parties is a valid one, that can be enforced. It is

true, as claimed by appellant, that, where there is no specific agreement to the contrary, freight is not deemed earned until the voyage is completed, and the goods are delivered or ready to be delivered at the point of destination. But this principle has no application whatever to a case like the present, where it is expressly provided:

> 'The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit.'

The true rule in regard to contracts of this character was thus expressed by Lord Ellenborough, C. J., in 1815, in *De Silvale v. Kendall*, 4 M. & S., 37, 42:

> 'By the policy of the law of England freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent to the parties to a charter party to covenant by express stipulations in such manner as to control the general operation of law. The question in this case is whether the parties have not so covenanted by the stipulations of this charter party. If the charter party be silent, the law will demand a performance of the voyage; for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words not express, but sufficiently intelligible to that end, that a part of the freight (using the word "freight") should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate? * * * And there can be no doubt that the payment of freight may by the agreement of the parties be so exempted.'

In 7 Am. & Eng. Enc. of Law, 246, it is said:

> 'It is competent for the parties to a contract of affreightment to stipulate expressly that the freight, or a part thereof, shall be payable absolutely at the time of the shipment of the cargo, or at a certain time thereafter, without regard to performance of the contract.' "

In *Burn Line, Ltd. v. U. S. & A. S. S. Co.* (1908), 162 Fed. Rep., 298 (certiorari denied 212 U. S., 580), the bills of lading contained the provision:

> "Freight prepaid is considered earned at time of payment, and is not recoverable, ship lost or not lost."

His Honor Judge Ward, delivering the opinion of the Circuit Court of Appeals for the Second Circuit said (p. 300):

> "The prepaid bill of lading freight, even if the goods were not delivered, could not be recovered by the shippers on account of the clause above mentioned."

See also *The Queensmore*, 51 Fed. Rep., 250, aff'd 53 Id., 1022.

In the present cases the right to retain prepaid freight is, by express agreement, absolute, and not dependent upon the success or eventualities of the voyage.

There is no decision in any jurisdiction which denies to the shipowner the right to retain prepaid freight where the bill of lading contains an appropriate provision to that effect, and this right is fully recognized in all the cases.

In *The Kimball* (1865), 3 Wall., 37, 44, it is stated in the opinion of the court, delivered by Mr. Justice Field:

> "Freight being the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special agreement to the contrary, to be refunded, if from any cause not attributable to the shipper the goods be not carried" (citing *Watson v. Duykinck* [1808], 3 Johns., 335; *Griggs v. Austin* [1825], 3 Pick., 20; *Phelps v. Williamson* [1852], 5 Sandf., 578).

See also:

36 *Cyc.*, 311;
7 *Am. & Eng. Ency. of Law* (2d Ed.), 246, 248;
Hutchinson on Carriers (3d Ed., 1900), Sec. 831.

The distinction between the English law, and the law existing elsewhere, is that under the former the rule has become firmly settled by early decisions that a prepayment of freight implies an agreement that it is absolute and to be retained, irrespective of the outcome of the voyage, unless this inference be excluded by the express language, or the clear implication is that it was to be treated as a loan, independent of freight; whereas the rule existing in America and elsewhere is that the prepayment is considered to be conditional on the performance of the voyage and can be recovered back, unless there is an express stipulation or clear implication to the contrary.

This distinction is not material in the present case as the bills of lading contain such an express stipulation.

The English rule is discussed in the following authorities:

Abbott on Merchant Ships and Seamen (14th Ed., 1901), pp. 664 *et seq.*;
Maclachlan's Law of Merchant Shipping (5th Ed., 1911), pp. 575-7;
Bryne v. Schiller (1871), L. R. 6 Ex., 319;
Allison v. Bristol Marine Ins. Co. (1876), L. R. 1 App. Cas., 209, 226.

Irrespective of claimant's right to the prepaid freight under the express provision of the bill of lading, it would clearly have been entitled to the freight moneys as compensation for the outward voyage to the point of turning and for the homeward voyage.

The course traversed was far longer than the contemplated voyage would have been, and it was taken by the master as the only safe course in the emergency that had arisen and as one that was for the benefit of the libelants, the completion of the voyage having been prevented.

The same reasoning is applicable to the present case as was applied by Lord Mansfield in *Christy v. Row* (1898), 1 Taunt., 300, and by the Privy Council in *Cargo ex Argos* (1873), L. R. 5 P. C., 134, 155, where it was held that if a ship is prevented from delivering her cargo at or near the port of destination and is compelled to bring it back to the port of shipment, the ship is entitled to compensation in the shape of homeward or "back" freight.

In *Christy v. Row, supra*, Lord Chief Justice Mansfield said (p. 315):

> "Where a ship is chartered upon one voyage outward only, with no reference to her

> return, and no contemplation of a disappointment happening, no decision which I have been able to find, determines what shall be done in case the voyage is defeated; the books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned."

In *Cargo ex Argos*, *supra*, the Privy Council, in an opinion delivered by Sir Montague E. Smith, after quoting from the above decision of Lord Mansfield, says (pp. 164-5):

> "The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined. (Amongst others, *Tronson v. Dent*, 8 Moore, P. C. 419; *Notara v. Henderson*, Law Rep., 7 Q. B. 225; *Australian Navigation Company v. Morse*, Law Rep., 4 P. C. 222). It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing. * * * In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principles that

the expenses properly incurred may be charged to him.

Their Lordships have no doubt that bringing the goods back to England was in fact the best and cheapest way of making them available to the defendant, and that they were brought back at less charge in the Argos than if they had been sent in another ship."

See also:

The Teutonia (1872), L. R. 4 P. C., 171, 180-1, 183.

Under the law as laid down in the decisions above referred to, it is clear that the libelants are not entitled to a refund of the prepaid freight. In fact, as the course actually traversed was much longer than the contemplated voyage, and the expenses incurred for the cargo owners much greater than they would have been if it had been performed, the claimant would rightfully be entitled to further compensation for these additional services and expenses.

IX.

The decrees of the Circuit Court of Appeals should be reversed, and the cases remanded with instructions to dismiss the libels.

Respectfully submitted,

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Counsel for
Claimant-Petitioners.

April 5, 1917.

Office Supreme Court, U. S.
FILED
APR 17 1917
JAMES D. MAHER

United States Supreme Court.

OCTOBER TERM, 1916.

No. 922.

STEAMSHIP KRONPRINZESSIN CECILIE,
NORTH GERMAN LLOYD,
Claimant, Appellant,

vs.

NATIONAL CITY BANK OF NEW YORK,
Libellant, Appellee.

BRIEF FOR NATIONAL CITY BANK OF NEW YORK, APPELLEE.

SHEARMAN & STERLING,
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for National City Bank of New York, Appellee.

JAMES M. BECK,
CARL A. MEAD,
EDWARD E. BLODGETT,
Of Counsel.

C. G. Burgoyne Printing Business, 72-78 Spring St., New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 922.

THE KRONPRINZESSIN CECILIE CASES.

NORTH GERMAN LLOYD, CLAIMANT, *Appellant*,

v.

NATIONAL CITY BANK OF NEW YORK, *Libelant Appellee.*

BRIEF FOR NATIONAL CITY BANK OF NEW YORK, APPELLANT.

To avoid a needless multiplication of briefs, the National City Bank on the main question of liability submits its case on the brief filed by the Guaranty Trust Company, in the preparation of which counsel for the City Bank have collaborated.

This supplemental brief will only discuss the few distinguishing facts in the two cases, the differences having principal reference to the ultimate liquidation of damages, and very little bearing upon the main question as to Appellant's liability under its contract of carriage.

While the entire shipment of the Guaranty Trust Company was to Plymouth for London, part of the National City Bank

shipment was to the same destination and a part to Cherbourg for Paris, both shipments being on the same voyage *en route* to Bremerhaven.

Appellant's argument proceeds upon the assumption that the North German Lloyd Company, acting either through its owner or its captain, had a right before its arrival at either Plymouth or Cherbourg to abandon performance, in anticipation of political complications and a possible declaration of war, if it believed in good faith that an attempt to proceed with the voyage to those ports might in the event of war imperil the safety of the steamer. If this argument be sound the difference of a few hours in the time when the ship would have arrived in Plymouth and Cherbourg respectively becomes unimportant.

If, however, the law be, as we are confident the brief of the Guaranty Trust Company clearly shows, that neither the owner nor the captain had any such right, then the estimated hour of the arrivals at Plymouth or Cherbourg does not affect the question of liability in principle.

The National City Bank had two shipments of gold bullion on the steamship, one valued at $1,061,718.89, to be landed at Plymouth for London, and the other valued at $2,104,254.34, to be landed at Cherbourg for Paris. In the two contracts of carriage for these two shipments, the destination of the ship was given as Plymouth and Cherbourg respectively. The bills of lading contained no intimation that the ship had as an ultimate port of destination Bremen or Bremerhaven. In this respect also the City Bank's case differs from that of the Guaranty Trust Company.

So far as the shipment to Plymouth is concerned it is not necessary to recite the facts more fully set forth in the brief of the Guaranty Trust Company. *The shipment of that Company and the shipment of the National City Bank to Plymouth were on the same vessel and the facts therefore, upon which liability must depend, are precisely the same.*

As to the shipment to Cherbourg, the testimony developed a difference of opinion as to the precise hour, when the Cecilie would have probably reached that port, if its captain had not abandoned his voyage under peremptory orders of his owners.

The appellant claims that its steamer could not have reached Plymouth on August 2d before midnight and that in that event it would have been necessary for it to have remained off Plymouth until five o'clock in the morning of August 3d and that, therefore, allowing an hour for disembarkation at Plymouth, it could not have reached Cherbourg and landed the gold shipment in question before noon of August 3d.

The National City Bank contends, upon the record of the voyage and the record of past voyages under similar circumstances, that the Kronprinzessin would have reached Plymouth before midnight of August 2d and would therefore have reached Cherbourg early in the morning of August the 3d.

Whichever view is taken of the testimony, the fact remains uncontradicted, as found by the Circuit Court of Appeals in the prevailing opinion of Judge DODGE, as follows (p. 12 of printed Opinions):

> "So far, therefore, from proving actual and immediate danger of war simultaneously involving actual and immediate danger of capture or detention on July 31, when the ship turned back, the evidence shows that this specie could probably have been delivered as agreed before any actual war began or any immediate danger of capture or detention arose."

Judge HALE, of the District Court, made no finding upon this question (fols. 1600-1602) and the dissenting Judge (PUTNAM, J.) in the Circuit Court of Appeals did not dissent upon that point (p. 35 of Printed Opinions of Circuit Court of Appeals).

It is therefore not important, so far as the question of liability is concerned, which view this Court may take as to the

precise hour of the arrival at Cherbourg on August 3, for the Cherbourg shipment, even on the appellant's theory of the facts, would have been landed in France *at least seven hours* before Germany declared war upon France; and if the appellee's theory of the facts be true, the shipment would have been landed *at least twelve hours* before.

The Cecilie sailed from New York Tuesday, July 28, at 1 A. M. Captain Polack testified that, under the circumstances, he believed that he would not have arrived at Plymouth before midnight on August 2. No reasons are given, however, for this opinion, which was only the conjecture of a party in interest. He testifies that the Cecilie was, compared with the last voyage, twenty-four miles behind at noon on Friday, July 31. He testified that, when he turned about at 10.09 P. M., on July 31, he was 1,070 miles from Plymouth.

This statement was based, however, not upon an observation, but upon dead reckoning. That there may be some doubt about this dead reckoning is indicated by the statement of the Board of Directors at Bremen, based on the careful computations of their Nautical Department, that the Kronprinzessin Cecilie, at the time when she turned about, was only 1,057 miles from Plymouth, instead of 1,070 according to the captain's computation, although based on the same position, 46° 46′ N. and 30° 21′ W.

The captain said that if he had arrived before midnight of Sunday, August 2, he would have disembarked his gold and passengers that night, and would have left Plymouth about 1 A. M. of Monday, August 3; that he would have proceeded at once to Cherbourg; that the running time from Plymouth to Cherbourg was about 5½ hours; that, in that event, he would have arrived at Cherbourg at half-past six or seven o'clock in the morning of Monday, August 3, and would have discharged his cargo and left there between seven and eight o'clock in the morning of August 3; that the running time from Cherbourg to

Bremerhaven is about 22 hours, and that he would, accordingly, have arrived in Bremerhaven at about 6 A. M. of Tuesday, August 4.

At the request of the appellant he submitted a statement of the actual time of the thirteen immediately preceding voyages of the Cecilie from New York to Bremen. From this statement it appears that the average running time from New York to Plymouth was 142 hours and 28 minutes. This would have brought her into Plymouth on the present voyage at 11.28 P. M. of Sunday, August 2. According to the captain's testimony, she could, in that event, have discharged her gold and passengers that night. Her average time at Plymouth for the previous thirteen voyages was 52 minutes. On that basis she would have left Plymouth on Monday morning, August 3, at 20 minutes after midnight. Her average running time from Plymouth to Cherbourg for the thirteen voyages was 4 hours and 55 minutes. On that basis she would have arrived at Cherbourg at 5.15 A. M. that day. Her average time at Cherbourg for the thirteen voyages was 43 minutes. On that basis she would have left Cherbourg on Monday morning, August 3, at 5.58 o'clock A. M. Her average running time from Cherbourg to Bremerhaven for the thirteen voyages was 22 hours, 54 minutes. On that basis she would have arrived at Bremerhaven on Tuesday, August 4, at 4.52 o'clock A. M.

On the immediately preceding June voyage, in which she arrived at Plymouth at twelve minutes after midnight, she left that port an hour later, thus disproving his underlying assumption that his boat could not at once leave Plymouth for Cherbourg, if it arrived at the former place after midnight. On the March voyage she arrived at Plymouth at 4 A. M. and left Plymouth at 5.18 A. M. If she had left Plymouth at 5.18 A. M. of Monday, August 3, 1914, she would, if the average of her thirteen preceding voyages is applied, have arrived at Cherbourg on Monday forenoon, August 3, at 10.13 o'clock A. M.;

she would have left Cherbourg 43 minutes later, at 10.56 A. M., and would have arrived at Bremerhaven 22 hours and 54 minutes later, at 9.50 o'clock A. M. of Tuesday, August 4.

It may be suggested that all this is only conjectural. In the nature of the case it must be. The appellant broke its contract upon a *conjecture* of what might have happened. It cannot complain, if we show by the record of previous voyages, (taking the average) that his conjectures are not borne out by past experience. The time of the year was favorable, the weather propitious and no port regulation required any detention at Plymouth. It is clear therefore that the Cecilie could have reached Cherbourg early in the morning of August 3, and left in less than an hour for her home port.

The progress of events so far as France and Germany are concerned, between July 31, when the steamship turned back, and the early morning of August 3, when she would have arrived in the usual course at Cherbourg, was as follows:

On August 1 the German Chancellor advised the German Ambassador in London that Germany guaranteed that, between then and Monday, August 3, *at 7 P. M.*, the French frontier should not be crossed, if England's acceptance of a German proposal, relative to the neutrality of France, had reached Germany by that time. *This amounted to a guaranty that there would be no hostile operations by land or sea until 7 P. M. of August 3.*

On August 1 the French troops at the border were under orders not to go nearer than 10 kilometers from the frontier. On the same date France gave orders for a general mobilization for purely defensive purposes, stating that French troops would not attack, and that a zone of 10 kilometers was left between the French troops and the frontier. On the same date the German Emperor telegraphed to the King of England that, if France offered neutrality, guaranteed by England, he would refrain from attacking France. On August 1 the French Premier informed the German Ambassador at Paris that the

French mobilization did not necessarily entail war, and that the German Ambassador might stay in Paris. The German Ambassador remained in Paris and the French Ambassador in Berlin until October 4.

On August 2 the German army entered Luxembourg, but the German authorities informed the Minister of State of Luxembourg and the French Foreign Minister that this action did not constitute a hostile act as against either Luxembourg or France. On August 2 the French Government handed a protest to the German Ambassador in Paris in regard to some sporadic difficulties on the frontier between patrols, and informed him that the French Ambassador at Berlin had been instructed to make a formal protest to the German Government against these acts "which are not justified by anything in the present situation." As these acts were made the subject of direct diplomatic protest, it is clear that no state of war existed at that time. Certainly none was recognized by either nation.

During the morning of August 3, the German Foreign Secretary advised the French Ambassador that the German Government had not yet come to a decision as to the severance of diplomatic relations. This necessarily implied the existence of the peace status with all its obligations. This was at the very hour that the Cecelie would have landed the shipment of gold at Cherbourg. On August 3 martial law was proclaimed in France. An official communication was published in Berlin on August 3, stating that the French reply to Germany's note had been received and was unsatisfactory, that France had ordered mobilization, and that the outbreak of war between Germany and France *must be awaited* at any moment. This statement necessarily implies that a state of war did not yet exist between France and Germany.

Finally, at 6 P. M. of August 3, the French Ambassador at Berlin was handed his passports and three-quarters of an hour later, at 6.45 P. M., just fifteen minutes before the expiration of the guaranty of the German Chancellor, the German Ambas-

sador at Paris delivered to the French Minister for Foreign Affairs a declaration, reciting alleged hostile acts of France and announcing that Germany considered itself in a state of war with France. France then for the first time considered herself at war with Germany. Obviously until that time no German merchant vessel was in any peril of capture. The German Ambassador even then announced to the French Foreign Minister :

> " At the same time I have the honor to bring to the knowledge of your Excellency that the German authorities will detain French mercantile vessels in German ports, but they will release them if, within forty-eight hours, they are assured of complete reciprocity."

It thus undoubtedly appears that even on appellant's computation, its steamer would have left Cherbourg at least *eight* hours before a state of war was recognized, while on appellee's conclusion it would have had at least *thirteen* hours, which would have been enough to take its ship more than half way to Bremerhaven.

If the steamship could have safely discharged her cargo at Cherbourg and left that port, the Court is not concerned with her further movements. If she could not have reached Bremerhaven she could then have returned to New York. With that question this appellee is not concerned, as the appellant was at least bound to fulfill its voyage so far as practicable, and as the voyage contemplated arrivals at Plymouth, Cherbourg and Bremerhaven in the order named, the ship should have carried out its voyage so far as practicable. At the hour when war was declared, she would, in the ordinary course, have been from 185 to 275 miles from Cherbourg, or well out from the Channel in the North Sea. Even if there were any French warships in the Channel, which does not appear, she would then have been under the protection of the German fleet. Appellant in its brief (p. 36) asserts that counsel for the

Appellees admitted in open court that "it was extremely improbable that the Cecelie could have arrived safely at Bremerhaven." We deny that any such concession was made, and assert on the contrary that the strong probability was that the Cecilie would have reached its home port in safety. That she would then have been safe from French interference appears from what happened to other German ships. Another Kronprinzessin Cecilie, owned by the Hamburg-American Line, was bound eastward from New York to Hamburg, passing through the English Channel late at night on August 3, and voluntarily put into the port of Falmouth, early in the morning of August 4. She lay there in safety until the morning of August 5, when, war having been declared on Germany by England, she was seized by the British authorities.

On August 4 the German steamship Ophelia cleared from the Custom House at London and sailed for Hamburg.

The Kronprinz Wilhelm, a German steamship, having full knowledge of the situation, cleared from New York for Bremen on August 3, 1914, at 4:30 P. M.

The action of the master in turning back, therefore, was not an exercise of discretion to escape arrest and restraint of princes, which was immediate and threatening and of which the vessel was in danger at the time, but it was clearly the action of the master in obeying definite instructions from his owners, *who feared that war might be declared at some future time*. This is not a "restraint of princes" but a "restraint of politics," which the law does not recognize. To allow the owner to speculate on political possibilities would be to make a farce of its liability as a common carrier and its express contract to deliver.

On account of the fear of what the future might bring forth, the owner had intentionally given the master *false information*, so that he would not use his judgment, but would implicitly obey its orders. It deemed it essential to convey to him such information, *although it knew it to be false*, as would

leave no doubt as to its carrying out its orders. It is clear that the owner cannot avail itself of its own wrong and rely upon an excuse that the master's judgment coincided with its instructions.

A fixed contract of carriage, whose obligations are favored by public policy, cannot be broken upon a mere conjecture as to future political complications. These were known to the appellant when it accepted the shipment. It could have reserved a discretionary right to deviate, if it anticipated the outbreak of war. It did not do so. It covenanted to deliver the gold, unless arrested or restrained by governmental action. Such did not exist. Anticipation is not enough.

The danger of war was as evident upon the date of issuing the bills of lading as it was when the voyage was abandoned and there was no more "arrest and restraint" on the night of July thirty-first than there was on the twenty-seventh.

It should also be remembered that on the arrival of the ship at Plymouth the captain could easily, and without breach of his contract, have discharged the Paris shipment to the National City Bank at Plymouth and transshipped the same from there to Cherbourg for Paris, and immediately left Plymouth early in the morning of August 3 and have been in Bremerhaven several hours before there was any declaration of war with France.

There is no evidence that any French warship was in the vicinity. The only evidence upon this point is the declaration of Sir Edward Grey to the effect that if Germany attacked the coast of France the English fleet would protect it *because the French fleet was mobilized in the Mediterranean.* The main fact is that war did not exist, when the contract of carriage was broken, and on the contrary there was an express assurance that hostilities would not begin until the evening of August 3rd.

The war had not broken out when the voyage was abandoned and the contract of carriage broken. As events proved, war did not exist until after the contract of shipment would have been completed in the ordinary course.

There is not a reported case, in which such a breach of contract is excused merely because of a fear of war, no matter how well grounded such fear may be, unless in cases like that of the *Styria* (186 U. S., p. 1) upon which the Appellant relies, where the contract of carriage expressly gave to the Master a wide discretion as to a safe port and a continuance of the voyage. In that case, war had broken out and the Master exercised a discretion, expressly given him by the contract of carriage, to avoid an undoubted peril. It is well settled that a party to a contract is not justified in breaking it merely because of a fear of war which does not yet exist.

The law is fully and convincingly set forth in the brief of the Guarantee Trust Company, on which, as previously stated, this Appellee relies to establish the Appellant's liability, and the pertinent cases from the time of Chief Justice MARSHALL to the very latest case in the House of Lords during the war there cited.

The decree of the Circuit Court of Appeals should be affirmed with costs.

Respectfully submitted,

SHEARMAN & STERLING,

BLODGETT, JONES, BURNHAM & BINGHAM,

Proctors for Appellant.

JAMES M. BECK,

CARL A. MEAD,

EDWARD E. BLODGETT,

Of Counsel.